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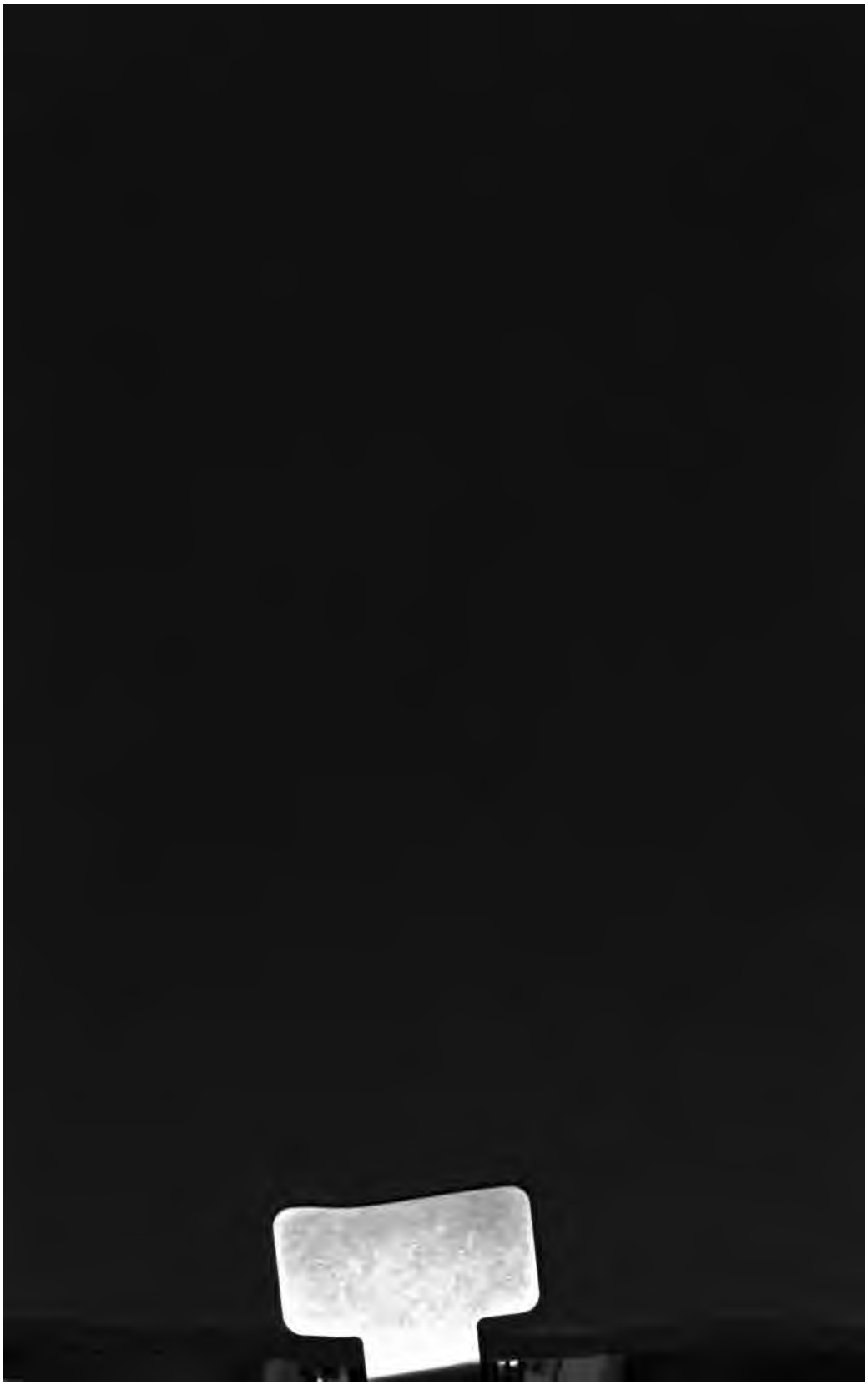

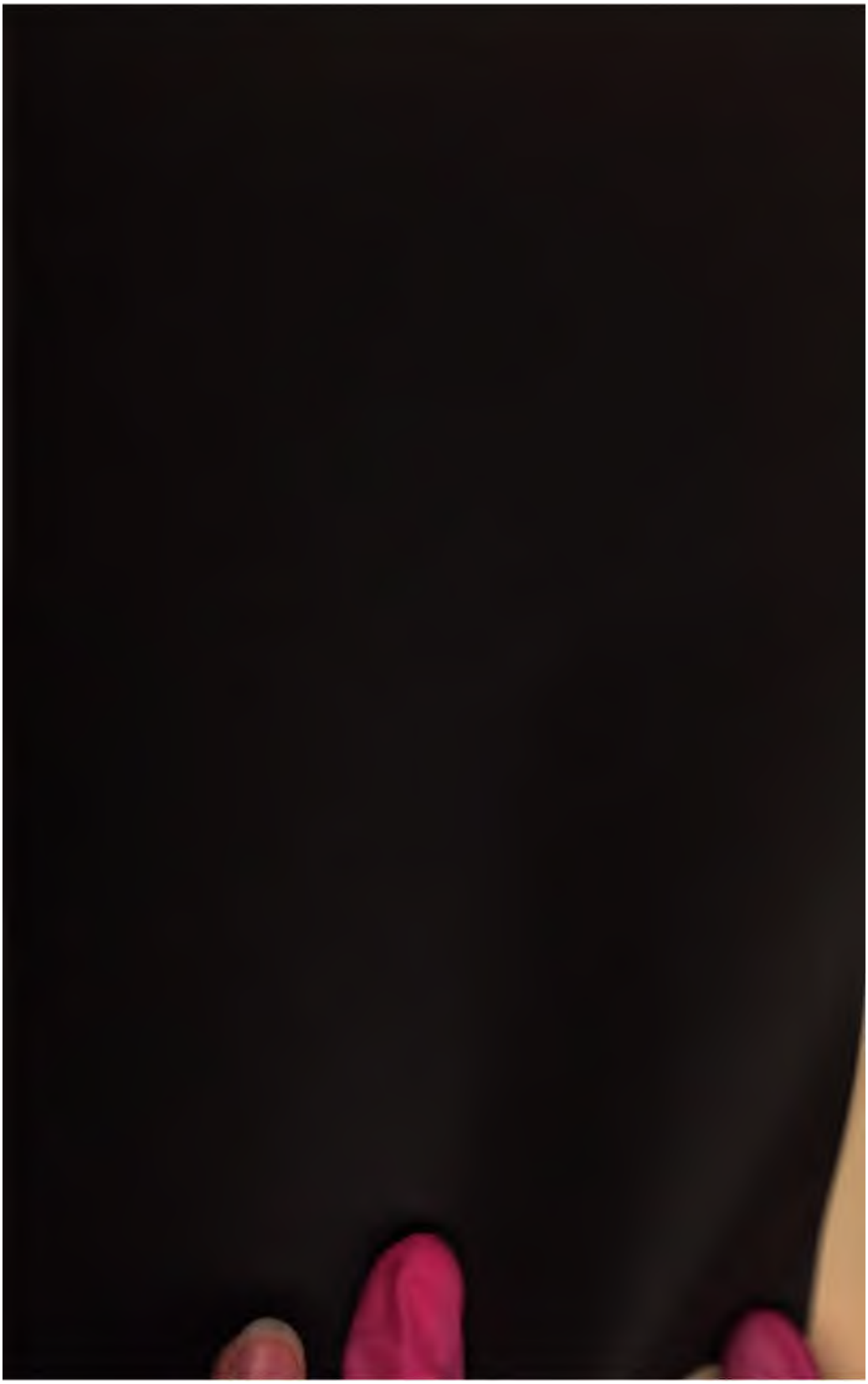

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JUSTICIARY COURT PROCEEDINGS

VOL. II

OCTOBER 1905

THE RECORDS

OF THE PROCEEDINGS OF

THE JUSTICIARY COURT

EDINBURGH

1661-1678

Edited, with Introduction and Notes, from a MS.
in the possession of JOHN W. WESTON, Esq., by

W. G. SCOTT-MONCRIEFF,
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NOTE BY THE EDITOR

By an oversight, for which I wish to express my regret, the following notes to Volume I., kindly supplied by Mr. Weston, were not identified by the letter W.—viz.: Note 1, p. 13; note 1, p. 16; note 1, p. 19; notes 1 and 2, p. 24; note 1, p. 43; note 1, p. 48; note 1, p. 53; note 1, p. 81; note 1, p. 106; note 1, p. 166; note 3, p. 189; note 2, p. 201; note 1, p. 208; note 2, p. 212; notes 2 and 3, p. 235; note 1, p. 304.

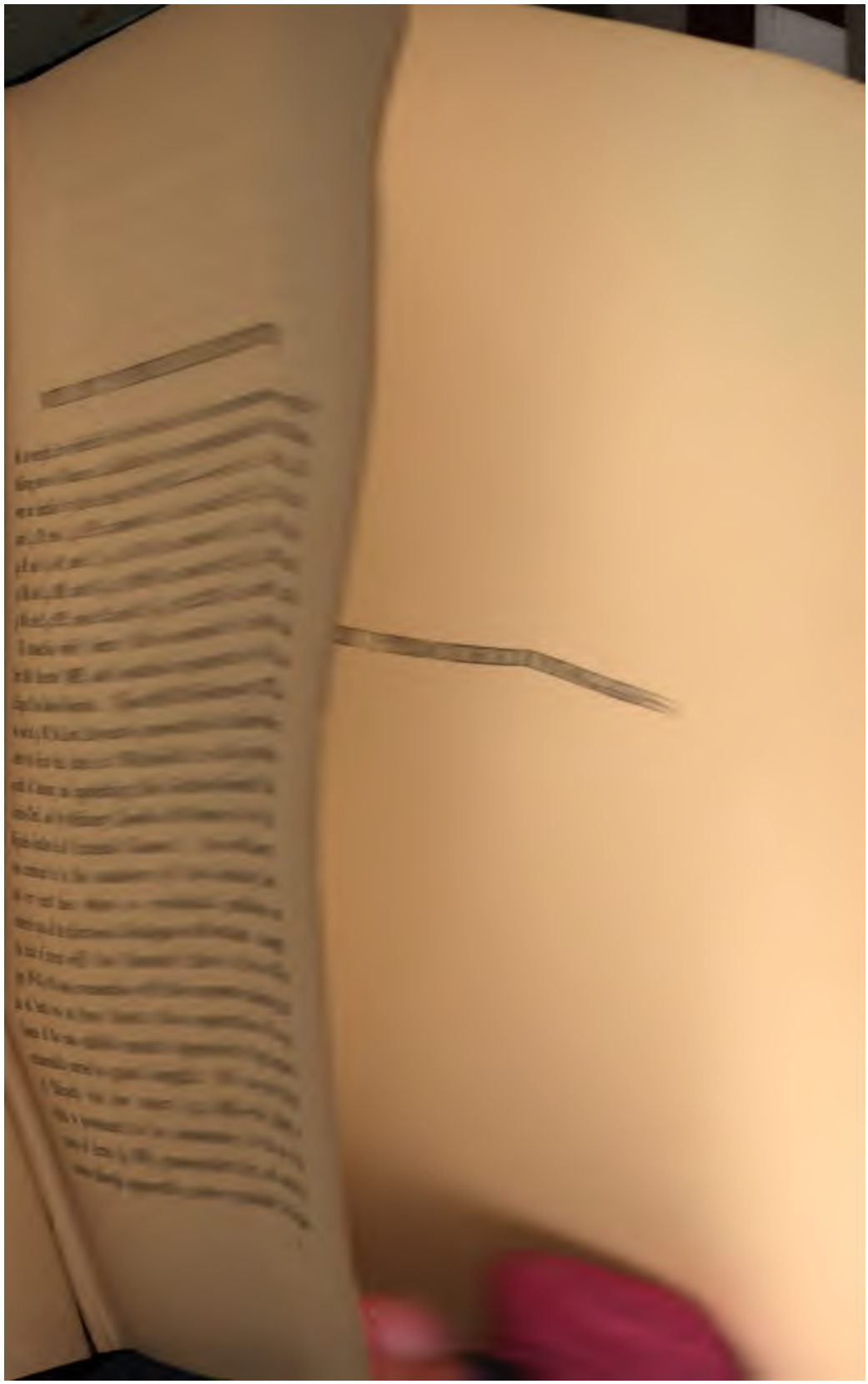
The transactions which form this second volume date from 24th December 1669, and contain reports of the last sittings of the Justice-Deputes. Upon 6th February 1671, as we read at p. 30, the Lord Advocate presented a Commission under the Great Seal, dated at Whitehall in the previous month of January, and appointing the Justice-General, the Justice-Clerk, and five Ordinary Lords of Session to be 'his Majesties Justices in all Criminal Causes.' As is well known, seven continued to be the number of the Justiciary Court until very recent times when a criminal jurisdiction was conferred upon all the thirteen Judges of Scotland. Amongst the trials of interest will be found that of the two Weirs (pp. 10-15), with some remarks of the reporter indicating that he at least was not free from the superstitions of his age. Some of the cases exhibit much ingenuity of legal argument occasionally carried to great length. We may refer to Skeen of Halyards tried for usury (p. 66)—the judgment in which is pronounced to be nonsense; to the case of the curate of Arran (p. 85), prosecuted for, and convicted of, murder, although apparently never punished; the Farquhar-

sons against the M^cIntoshes *alias* M^cCombies for slaughter—the story of a curious Highland feud (p. 143); the case of Nicolson for shooting (p. 165), where Sir George Mackenzie 'sextuplies'; the quaint story of prison-breaking related in the Magistrates of Aberdeen *v.* Hilton (p. 171); and of beating and wounding a magistrate in the person of the Bailie of Inverurie (p. 177). A duel leads to much hair-splitting in the Advocate *v.* Robertson (p. 183). The trials of Haitley *v.* Fraser and Fraser *v.* Haitley (p. 190-208) illustrate the law relating to adultery. Cases of lawless oppression will be found in Birnie *v.* M^cKenzie, Reid *v.* Barron Taylour (pp. 211 and 219), and M^cLeod of Assint (p. 224). In this last case the arguments are of great length.

The political trials are not numerous. That of Mr. Andrew Kennedy (p. 110) for publishing treasonable pamphlets, introduces the names of several well-known covenanting divines. The record closes before the great outburst of Government activity which followed upon the murder or martyrdom of Archbishop Sharp. But we have the full proceedings in the case of James Mitchell throwing a sad light upon this unhappy period of our history.

W. G. S. M.

JUSTICIARY PROCEEDINGS



JUSTICIARY PROCEEDINGS

HERE begins the next BOOK OF ADJOURNALL, commencing from the 24 December 1669 to the 1st August 1673 inclusive.

Edinb^{r} 24 December 1669. Renton, Justice Clerk, Deputes Murray and Preston present.

Sommerveil for Parricide. Is the leathalitie of the Defunct's wounds to be admitted to the probation of the pursuer, or will the Defender be allowed to prove she died of other diseases.

Mr. William Sommerveil, servitor to the Marquiss of Douglass, indyted at the instance of the King's Advocate and Thomas M^{c}Math as Informer, for the Slaughter of Bessie Renton, his mother, upon the 9th of January 1663, in the Burgh of Douglass, by giving her a stroke on the head and divers other strokes on the Body with a Tree, to the great effusion of her blood, whereof she languished by the space of 12 weeks and then died.

Sir Geo: M^{c}Kenzie for the Pannell Alledges he cannot go to the knowledge of an Inquest[1] because its offered to be proven that if any stroke was given (which is denied) it was no mortall wound, and that the Defunct did not demean her self at the time as one who had got a mortall wound, but on the contrary went from the house where the said stroke is said to have been given, that night a mile and a half, and within two or 3 days thereafter, went five miles farther and wrought after her ordinary and wonted way, and was to be married severall months thereafter. Likeas having lived for 12 or 13 weeks she attended her brother who lay sick of a Purpie ffever and so frequented a suspected place and is repute to have been infected and to have died of that ffever which of its own

[1] 'Assize' in Adv. MS.

nature is infectious and mortall, whereas in Law *Qui per tri diem post vulnus illatum ambulaverit* he is not presumed to have died of that wound unless it be proven to have been of its own nature mortall from the beginning, at least she having gone about her ordinary employment for 40 or more days (as indeed she did) its sufficient in Law to exculpate from the crime of Murder, and the Pannell repeats and oppones his exculpation.

Replys Sir Geo: Lockhart for the pursuer, the Defence ought to be repelled and notwithstanding thereof the Pannell should be put to the knowledge of an Assize in repect of the terms of the Dittay wherein its positively lybelled that the Pannell did inflict divers mortall wounds upon the Defunct, and that she died of these wounds, and in fortification of the Dittay its offered to be proven that the wounds were mortall and lethall, and the Defunct having died shortly thereafter, her death can be ascribed to no other cause, and as to the pretence that the Defunct survived 40 days and more and did the severall acts mentioned in the Defence of Exculpation, the same ought to be repelled in respect it is lybelled and offered to be proven that the wounds were of their own nature mortall *Quo casu* if the Defunct thereafter died tho' *ex longo intervallo* the Defender *tenetur de occiso et non de vulnere* notwithstanding that she have adhibite no cure nor has committed Acts of Intemperance whereby her death was accelerated. And albeit *in casu dubio* wherein positive probation is offered as to the quality of the wounds, and that the same were offered to be proven presumptive from the ensuing circumstances and events, there might be some weight laid upon the length of time *post vulnus incussum et illatum* and whereanent there is some difference amongst the Lawyers, some extending it to 40 days, some to a year, some to 2 years and some to 3 years, yet the most common opinion of Lawyers and most consonant to Law and Reason is, that *committendum est judicis arbitrio* who is to perpend the same from the condition of the party wounded and other concurring circumstances, and which in the opinion of the Doctors does only amount to a presumption and takes only place *in casu dubio* where there is no positive probation offered as to the quality of the wounds

Trial of Wm. Sommerveil for the murder of his Mother.

ane does not proceed in the case where the Defunct after inflicting of the wounds *semper processit de malo in pejus* which is the positive opinion of Clarus, §. *Homicidium*, No. 11. 41. and 42, Farinacius *Quest.* iii. 11, 48, and 49, Gaill. and many others, all which and especially Zachias in his *Questiones medico legales* makes only to hold in the case of Presumption and that only *in casu dubio*, and the contrary would be obnoxious to inconveniencies and a patronizing of murders, ffor the quality of wounds, whether they be lethall or not can never be considered with respect to a generall but with relation *ad individuum* and according to the validity and strength of the body on which they are inflicted and as *citius ve serius operantur mortem*, and there is nothing more obvious to common sense than that a person may be mortally wounded and yet constantly languish in these wounds for the space of 12 weeks, especially where the wound was given in the head where the part immediately affected *habet in se plures partes* which must be likewise affected before death can follow, and which affecting requires some considerable time *in corpore robusto et valido*, and in bodies that are not full of humours, as lawyers do most judiciously observe. And as to the other circumstances of exculpation, the same are most irrelevant in respect of what is already offered to be proven, viz. that the wounds were of their own nature mortall, and all Lawyers and particularly Zachias do allow even in the case of mortall wounds that there may be intermissions and remmissions which may be sometimes apparent and sometimes reall but not compleat and perfect, during which remmissions it cannot be doubted but a person may be in a capacity to exercise especially *de recenti* after receiving of the wound, but these are never sufficient to elude the quality thereof, whereupon *morbi acuti* does not immediately follow, but *morbi magis* such as *deliria*, *stupefactio*, and the like, and such was the case of the Defunct after she received the saids wounds and untill the time of her decease, which is a stronger qualification than all the other acts insisted on, even tho wee were *in casu dubio* as wee are not, and therefore the pursuer repeats and oppones the Dittay, and that which he has now proponed in fortification thereof, that the wounds were of their own quality and

nature mortall, which is so strongly founded in Law and Reason that it cannot be eluded by the Acts mentioned in the exculpation, and farder oppones the Act of Parliament in *anno* 1661, viz. Act 22 of that Parl. where no Defence is allowed against *Homicido* such as this is but that it was in defence.

Duplys Mr. Andrew Birnie for the Pannell, that he oppones the Defence bearing that the wound was not mortall, which is a peremptor Defence and more positive and circumstantiate than the Lybell or Reply, as they are circumstantiate in swa far as the infallible tokens of lethall wounds assigned by the Doctors are first taken from the time the wounded person survives, which by the common opinion of Doctors, specially Clarus *de Homicidio* and Gomezius is restricted to 40 or 46 days, and Zachias says it is *communis opinio*. And albeit he says there that some singular Doctors do extend the time in extraordinary cases, yet § 13 he delivers his own opinion and says that this is *terminans accutorum morborum* and which is the same Question he resolves in severall other places. And there is some reason for it *ut incerta stat hominis vita* that depends upon the nature of the wound, and albeit the Reply might take place in wounds *indubitanter* lethall as when man is wounded in the noble parts or the pia mater broke, yet in this case of a wound which is not lethall in that manner but dubious and might have been cured by application of medicaments, the Pannell ought to be excused, seeing the Defunct lived 12 weeks, unless it were offered to be proven that medicaments were used. 2° The Pannell for clearing that this wound was not mortall condescends upon these qualities, viz. that there were intermissions *non apparentes et ficte tantum* arising *in natura debellata* (in which case the sick partie cannot discharge the duties of life) but arising from the victory of nature over the wounds, and does evince that there was some extrinsick cause of the defunct's death, and that is that she died of a purpie ffever contracted in attending of her brother, as in the Defence. And tho it be true that where a ffever immediately follows upon the giving of a wound and the party dies of the ffever, yet the partie giver of the wound *tenetur de occiso*, yet this holds not where the ffever follows *ex intervallo*, and Zachias has restricted the time of the following ffever to 3

or 4 days. And in this case the ffever followed not in 10 weeks after the wound. And how then can the wound be said to be the cause of the ffever. And the Law says L. 2. § 2 ff. *ad legem Acquiliam quod si servus vulneratus naufragio ruina aut alio casu perierit tenetur percussor de vulnerato non de occiso,* which the Law does but restrict to a pecuniary mulct. And albeit there be some debate among the Lawyers anent the period and time forsaid *in casu decumbentis et in casu de ambulationis triduum sufficit.* And in the Defence its positively offered to be proven that the Defunct for divers weeks after she was wounded, went about her business and work in the ordinary way, and therefore the Defence being more circumstantiate, then the Libell or Reply ought to be sustained and admitted to the Pannell's probation.

Sir Geo: M^cKenzie farder Duplys, that tho in civil cases a Defence cannot be received contrary to the Lybell, yet its usual in criminals *ubi favorabilior est pars rei* [such as *exceptio alibi*] and among these is the exception of the quality of a wound, as to which the Pannell should be preferred in proving that it was not mortall, contrary to the Pursuer offering to prove it was mortall. And its not so much contrary to the Lybell as to an accident of it added to the Lybell of purpose to prejudge the Pannell, ffor such Lybells in common style does not always bear mortally wounded. And therefore the Pannell's Defence tho contrar should be sustained, just as when a Lybell bears a Slaughter to be committed on precogitate malice.

The Law sustains the exception of casuall homicide, which is contrary, and in effect this quality is more receivable, seeing all Libells bears precogitate Malice, but all Lybells bears not mortally wounded. So that the quality of the wound is rather receivable than the other. And to evidence that this is not a contrariety to the Lybell that can exclude exculpation, the Justices may perceive by the whole tract of the Debate that the question contraverted is not whether the Pannells could be exculpated if it were certain that the wound were lethall, But where the case is dubious, and whereas the Reply bears that the branches and qualities of exculpation are only receivable *in casu dubio*, the Pannell's

procurators do contend that this is not *casus dubius*. ffor the Defence as its proponed and circumstantiate makes it appear that *Vulnus non erat lethale*. ffor the definition of *vulnus lethale* in Law is *quando secundum regulas artis aut nullo modo potest sanari aut ex communi sententia medicorum assistantium cum maxima difficultate sanari potest*, Baldus *ad* l. 1. § *ult Dieg. ad Sylen*, and lest the life of man should be laid open to that which is too arbitrary, the great marks that are given of this lethall wounding are either *affixus lecto* or otherwise (except in the case of absolute necessity or a diserting from their bed on the account of madness, and tho' some particular persons that are mortally wounded may be forced to run away as from Battells, yet in the case where the person wounded never took bed where she might have had the occasion, nor send neither for Physicians, Ministers, nor her friends, tho she might have also had the occasion of them, but on the contrary where she went immediately abroad, travelled and wrought instantly as she was of use to do before (all which is positively affirmed and offered to be proven) and where so long a time likewise interveened betwixt her receiving of the wound and her death (which is more than to alledge upon a time *per se*). All these concurring together are undoubtedly relevant *in casu dubio* and much more in this case which is not dubious, but probable, as appears from former circumstances to evince that the wound was not mortall. And being so circumstantiate, the Pursuer[1] should be preferred in the probation thereof to evince that the wound was not mortall before the Pursuer who affirms it to be mortall.

Interloquitor. The Justices Repells the Defence and Duply proponed for the Pannel in respect of the Dittay and Reply, and ffinds the Dittay relevant, and ordains the same to pass to the knowledge of an Assize.

Verdict. The Assize finds the Pannel Guilty of the Slaughter lybelled, and upon the 26 of ffeb. 1670 he is sentenced to be beheaded at the Mercate Cross of Edinb^r^ on the 10 of May next thereafter.

The Proof. The Probation of this Crime was be Witnesses. The first

[1] 'Pannel' in Adv. MS.

two depones, that they saw the Pannell strike the defunct with a cane or cudgell on the head and blood her, and that he threw her to the ground and beat and bruised her with his feet, and that she lay long of that wound, and one of them did see her at her ffather's house 6 weeks thereafter. That she walked there that night after she got the wound, and that she was in a great distemper, and that they heard her blame the Pannell as to the cause of her death. The Witnesses depone as to Reports. Some say that by Reports it was ascribed to the wound and others to a ffever, but W^m^ Currie, chyrurgeon, last Witness, depones that the wound was in the fforehead, and that tho of its own nature it was not mortall, yet being joined with the fractious contusions and ruptures which accompanied the same, it could not be cured, and that it brought a symptomicall ffever on the Defunct, which continued to the time of her death, and that she had a ffever a week before she died.[1]

Trial of W^m^ Sommerveil for the murder of his mother.

Eod. Die.

There being a Petition given in to the Justices be Grant of Kirdells, prisoner in the Tolbooth of Elgin, making mention that he was incarcerate for some pretended crimes laid to his charge be Geo: Grant, son to Ballendallach, and for which Action was depending before the Justices, and that notwithstanding the Diet in that Action was deserted, yet the Magistrates of Elgin, pretending they knew nothing of the deserting, would not suffer the Petitioner to be put to liberty, and therefore craving that the Justices would declare that the Diet was deserted and that they knew no other cause of his imprisonment or for which he ought to be detained by the Magistrates, which desire the Justices grants.

Grant of Kirdells, sett at Liberty.

Edinb. 4 January.

John Binning, merchant in Edinb^r^ against James Aikenhead in Rutherglen, and his spouse, for Theft, deserted.

[1] Sir George Mackenzie states that this decision was so ill liked that the Council recommended Mr. William to His Majesty, who granted him a remission.—W.

Edinb^{r} 10 January 1670.

Captain W^{m} Barclay, designed of Towie, against W^{m} Bellie at the Mill of Drumwhindle, William Steill at Gight and Alexander Bellie, at Towie, declared fugitives, and George Strachan of Sandihills, their Cautioner unlawed in 200 Ms. for each of the saids persons in respect they were formerly declared fugitives.

Edinbr. 14 January 1670.

King's Advocate against Cannon of Barley and others, for treason, continued.

Edinbr. 1 ffeb. 1670.

John M^{c}Intosh of fforder and his spouse against Robert ffarquharson of Bougdarg and many others, for Convocation of the Lieges, Hamesucken and wrongous Imprisonment.

Compears Mr. James Grant, writer in Edinb^{r} and produces the Criminall Letters, and the said Ro: ffrquaharson compearing for himself and in name of the remanent Defenders with his Advocats. It was alledged by these Advocates for the absent Pannells that they were not holden to make their appearance to underlye the Law for the crime lybelled, because they instantly prove by a Testificate under the hand of the Lyon Clerk that the Messenger who executes the Letters was no Messenger, but was deposed at the time, to which it was replied, that the Defence ought to be repelled because he was *habitus et reputatus* to be a Messenger at the time, and was in use to exercise in the place where he lived, and so the Pursuers were *in bona fide* to employ him to execute their Letters, and if there be any deficiency, the Pursuer ought not to suffer, but the Messenger should be punished.

The Justices refused to admitt of the Alledgiance as a sufficient excuse for the Pannell, but continued the Dyet till the 7th of June next and allowed them to compear then. *Vide* 7th of June where the Diet is deserted upon a new Debate.

Edinbr. 10. 22. 25 and 26 ffeb. 1670.

Archibald Stirling against John Spence and others, for Theft, deserted. The said 22 day Advocatus against Cannon of Barley, continued to June next.

The said 25th day there is a petition given into the Justices be Janet Maxwell, relict of the deceast James Armstrang, called of Parknow, and the son and brethren of the Defunct against Gavin Johnston of Whitsomehill, making mention that the said Gavin Johnston being formerly conveened for the Slaughter of the said James Armstrong, and upon the 2d of July last being declared fugitive for his not compearance, and being ordained to be denounced to the Horn, the Petitioner did raise Letters of Denunciation and Caption, and he being now apprehended he is Prisoner in the Tolbooth of Dumfries, craving therefore a Warrand to transport him to Edinburgh. And that the Magistrates of Dumfries may be ordained to do the same upon the Prisoner's own charges, and that the Magistrates of Edinburgh may be ordained to recieve him within their Tolbooth, which desire is granted.

26 day Mr. William Sommerveil's Doom is here recorded which I have sett down beside his Process.

Edinbr. 1st and 15 of March.

The Lady Rattar and her Cautioner excused for not executing of Criminall Letters raised against some persons in Caithness upon a Petition given in by her to the Justices representing that there was but one Messenger in the Countrey who would not undertake the employment which he verifies by an Instrument produced.

The said 15 day Patrick Leslie in Newmill against Patrick Dunbar of Balinaferry, Sherriff Principall of Murray, continued till the 4 of July next, and James Wiseman, his Depute, is excused upon production of a Testificate of his inability to travell, and Alexander Dunbar and Walter Chambers, procurtors ffiscalls to the said Sherriffs are declared fugitives, also the Pursuer's Witnesses are unlawed for not compearance.

Edinbr. 9 Aprill 1670. Mr. William Murray and Mr. John Preston, Deputes, present in the Court.

Advocatus agt. Major Weir for Incest, etc. etc. etc.

The said day Thomas Weir,[1] commonly designed Major Weir, indweller in Edinburgh, indyted and accused for Incests, Adulterys, ffornications, and Bestialitys as follows, viz. That when Jean Weir, his sister, was only of 10 years of age or thereabout, he did entice and endeavour to lye with her and defile her, and thereafter in the years 1620, 1621, 1622, 1623, and 1624, when she was but of the age of 16 and in the subsequent years, and in the months of January, ffeb. and remanent months of the said years and first, second and remanent days of the said moneths and years or ane or other of them of the saids days and months, within the House of Wicketshaw, Chambers, Rooms and Offices, Houses thereto belonging, yards and fields about the same or in ane or other of the saids places where the said Thomas and his sister were dwelling with their ffather, he did lye with the said Jean, had carnall dealling with her divers times even when she was past the age of 40, and when the said Thomas was past the age of 70 and she was also very aged he did lye with her within his dwelling house of Edinbr. 2° Did ly with Margaret Bourdon, daughter to . . . Mien, his deceast wife, at the time when her mother was married to the Pannell and in family with him at Edinbr., and also lay with her after the Decease of her mother, and when she became with child, the Pannell to palliate the Incest, did marry her to an Englishman. 3tio He is indyted of frequent and habituall Adulterys both during his marriage and when he was a single person, with married women, and continually persisted in the same till he

[1] An interesting notice of the two Weirs will be found in Wilson's *Memorials of Edinburgh*, vol. ii. p. 115. Major Weir was born at Kirkton, in Carluke parish, in 1599. The house still stands, an is occupied. He served in Ireland in 1642, and probably against Montrose. He was for a time lieutenant of the Edinburgh Town Guard. He is said to have commanded the Guard at Montrose's execution. He was a consenter to a conveyance of part of Waggetshaw by his father, Thomas Wier, or Weir, of Kirkton, in 1632. He was latterly known as one of the 'West Bow Saints,' his residence being in a small court off the Bow.

was of great age, and kept the said Jean Weir, his sister, and Bessie Weeymss, his servant, for that purpose by the space of 22 years. 4to Having defiled himself with this filthy crimes of Adultery, ffornication and Incest, he proceeded farther to the height of brutish abomination in committing Bestiality with a Mare in the year 1650 and 1651, at Newmills in the West Countrey, he having ridden there upon that Mare, and did lye with Cows and other beasts. And last of all for aggravation of his fault and to make it without a parallell, the Dittay bears he was conscious to himself of these Abominations, yet he had the confidence or rather impudence to pretend to fear God in an eminent way and did make profession of strictness, piety and purity beyond others, and did presume and take upon him to pray publickly in many companys and in the houses of his ffriends, neighbour and acquaintainces, and did affect and had the reputation and character of a pious and devout[1] man, thereby endeavouring to conceall and palliate his villanies and to amuse and impose upon the world and to mock God himself, as if his all-seeing eye could not see through the slender veil of Hypocrisy and formality, and could not discover and lay open to the view of the world so great and flagitious lewdness in its own colours in which it does now appear,[2] in doing whereof and committing of the saids deeds and crimes or ane or other of the samen the said Thomas Weir is guilty of the crimes aforementioned, at least one or other of them.

Eod. Die.

The Major's sister's trial for Incest and Sorcery.

Jean Weir, sister to the Major, is also indyted of the Incest with her brother in manner contained in his Dittay with the addition of some more circumstances and places as in particular in a Barn of Wicketshaw when her sister Margarett did come in and surprise them in the Act. She is also indyted of Sorcerys committed by her when she lived and keeped a school at Dalkeith. That she took employment from a Woman to speak in her behalf to the Queen of ffairie, meaning the Devil, and that another woman gave her a piece of

[1] 'good' in Adv. MS. [2] 'not now appear' in Adv. MS.

tree or root the next day and did tell her that so long as she keept the same she should be able to do what she pleased, and that the same other woman caused that woman to whom she gave the piece of tree,[1] spread a cloath before her door and sett her foot upon it and to put her hand to the crown of her head and to repeat thrice in the posture forsaid these words All her Crosses and Troubles go alongst to the Doors, which was truely a consulting with the Devil and Act of Sorcery, these things being done by none but Devills and Sorcerers and such as correspond with them, and the said Woman to whom the piece of Tree was given, did find the fruits and effects of the said Sorcerys, ffor after that Devil or Spirit which in the likeness of a Woman gave her that piece of tree was removed from her, she addressing herself to Spinning and having spun but for a small time, she found more yarn upon her Pirn than possibly could be in so short a time by good means, in doing whereof the said Jean Weir is guilty of Witchcraft and Sorcery, at least of consulting, communing, seeking and taking advice and help from the Devil or from Witches and Sorcerers, and of making up of the same, and is guilty of the said Crime of Incest, at least of one or other of the saids Crimes.

Probation ag^{t}. Major Weir by his judicial Confession.

After both Dittays were read and found relevant by the Justices, the King's Advocate caused interrogate the Major judicially anent his Guilt, who answered, he thinks himself guilty of the forsaid Crimes and cannot deny them, and the King's Advocate takes Instruments that he refuses to answer positively.

Thereafter the Advocate adduces his Witnesses, to wit John Oliphant, one of the present Baillies of Edinburgh, who depones that being at the takeing of the Major out of his own house, he heard him confess frequent incest with his sister Jean, many fornications and adulteries, and bestiality with the mare and cow lybelled, and William Johnstone another present Baillie, Archibald Hamilton, a late Baillie, Alexander Pitcairn, merchant, depones they were all present together and heard him confess the saids Crimes, and

[1] 'from whom she got the tree' in Adv. MS.

Mr. John Sinclair, Minister of Ormiston, depones that Major Weir having called him into the prison of purpose to confess his sins to him, he confessed he was guilty of Incest, Adultery and Bestiality, and desired the Deponent to pray for him, and particularly, after he was brought out of the tolbooth, confessed that he had committed Incest with his sister and that he had converse with the Devill in the night time. And Margaret Weir, sister to the Pannells and spouse to Alexander Weir, Bookbinder in Edinburgh, depones that she took them in the Act of Incest, and Anna Ker, the other Witness, depones that Major Weir on Munday last and this day in the forenoon, confessed to her that he was guilty of Incest with his sister Jean six years agoe, and that he was guilty of Incest with Margaret Bourdown, his wife's daughter, and of Bestiality with the mare, and that he had keeped this woman Bessie Weyms and had carnall dealing with her 22 years. And Mr. Archibald Nisbet, Writer to the Signet and Mr. John Alexander in Leith, deponed that he was guilty of the said bestiality with the mare by the common report of the countrey, and last of all the King's Advocate produced the Major's own Confession, whereby he in presence of the King's Advocate, Mr. John Preston, Justice Depute, and the Bailies of Edinb^{r} he doth confess and declare that a Gentleman having gifted him the mare, he road to the West Countrey upon her, and when he was near Newmilns he had carnall dealing with her, and that a woman did see him and delated him to Mr. John Neve, Minister at Newmilns, and that at the desire of the said Mr. John he was brought back to Newmilns with some soldiers but was dismissed, there being no probation against him but the said woman's Delation. Declares this was about the time when the Lords and Gentlemen were taken at Elliot. *Sic Sub^{r}* Thomas Weir. And after all this the forsaid Judiciall Confession was emitted in presence of the Assise tho it was first placed in the Book whereby he says that he thinks himself guilty of the haill Crimes of the Dittay.

The Advocate against Jean Weir produces her own Declaration, whereby she acknowledges her own Incest with her Brother during the haill time as it is lybelled and circumstantiate. Declares also that she knew Margaret Bourdown, her brother's

step-daughter was with child in his house and that all the people did believe it was the Major's, and that a servant of the house told it to the Declarant, and that the said Margaret did not deny it when she posed her on it after the Servant had told her, and confesses all the Sorcerys as in the lybell, and that her Brother had a mark like the Devil's Mark on his shoulder.

The Assise all in one voice finds the Pannell, Major Weir, to be guilty of the said horrid Crimes of bestiality with the mare and cow lybelled, and of the Crime of Incest with his sister Jean in manner contained in his Dittay, and finds the Pannell Jean guilty of the Incest also lybelled against her, and they take no notice of any other points of the Lybell notwithstanding of the Major's Judiciall Confession, because it was not positive and notwithstanding of the probation of the extra-judiciall Confessions, but simply passes them by.

The said Major Weir is sentenced to be taken on Munday the 11th inst. to the Gallowlie betwixt Leith and Edin^{r} and there betwixt two and four hours in the afternoon, to be strangled at a stake till he be dead, and his body to be burnt to ashes, and by the same sentence his sister Jean is decerned to be hanged at the Grass Mercate of Edinb^{r} on Tuesday, being the day thereafter. Which were accordingly execute, and the said Major not being able to travell for age, was dragg'd on a sled, the horse being led by the hangman, and died in despair declaring that he had no hopes of mercy, and the woman died folishly.[1]

I have sett down these Processes against these two unfortunate, unworthy and wicked persons at greater length then I use to do because the manner of their lives and deaths made a noise even in forreign nations as well as at home, they being looked upon by all as the greatest Hypocrites and most flagitious persons that had been for many years discovered in any nation. There was one thing discoursed and beleived of this Major Weir at the time of his Tryall, that he pretended to be so great a Casuist in practicall Divinity, that he

[1] At her execution, it is said that she struggled to throw off her clothes that, as she expressed it, 'she might die with all the shame she could.'—*Wilson's Memorials*, vol. ii. p. 117.

had been employed by many persons to solve the scruples of their consciences, and that when he prayed in publick in the families of other persons or in his own family, where neighbours came frequently to hear him, he did pray so well that he was admired by all persons, and it was observed of him that he keeped a long staff which he held alwise to his mouth when he prayed, which staff was taken with himself when he was taken out of his house at Edin^{r}, and the manner of his discovery does hold out much of the justice of God in the discovery and revealing of such sinners, for he having fallen sick in his old age in a house where he lived alone in the West Bow of Edin^{r}, where many Professors of religion lived about him, his neighbours were affrightned with the noise which they heard upon the night, and some of them having gone to see him, he declared to them that he had great horror of conscience and was troubled with the appearances of the Devill, which being discovered by some of the neighbours to the Magistrates, they immediatly caused examine and apprehend him and bring him to his tryall, as is above sett down.

Edinb^{r} 15th Aprile 1670.

King's Advocate against William Bruce *alias* Calum, prisoner in the tolbooth of Edinb^{r}. This person is indicted and accused of Thefts and many Robberies, Depredations, Sornings, Commerce and Traffique with Theives, takeing of black maill, committed by him in the years 1640, 41 and 42 and all years thereafter till he was apprehended for the Slaughter of William Forbes, brother to the Laird of Bruse, by stobing him because he challenged him and his company of Robbers that were with him for comeing to the Parochin of Kildrimmy and for the murder and slaughter of James Elies and Alaster Anderson, two of the said William's company in the house of Alaster Smith in Birkenbrewl in the parochin of Kildrimmy and sheriffdom of Aberdeen, which is the house where the said William Forbes came upon them, and is found guilty of the said three Slaughters and of most part of the other Crimes.

As also by another lybell Alaster Bain, another prisoner, is

indicted and accused of some thefts and robberies, and for the slaughter committed by him of Alaster Cleroch in Alloa, and the breaking of the prison of Alloa, and is found guilty by the same Assise upon a clear and liquid probation by Witnesses, and both of them are sentenced to be hanged at the Gallowlee betwixt Leith and Edinbr. till they be dead, and William Bruce's body to be thereafter hung in chains till the same rott and Bain to be buried.

Nota he who has filled up this sentence in the Book has ommitted the day of the Execution.

Edinbr. 23 and 24 Aprile 1670.

A Warrand granted by the Justices to the Magistrats of Banff to transport John Catanach, prisoner in their Tolbooth, with a safeguard to the Tolbooth of Edinburgh, and the Magistrates of Edinbr. to receive him that he may be ready to underlye the law before the saids Justices at Edinburgh, upon the 13th of June next for the Slaughter of William Cuthbert. This proceeds upon a Petition given into the Justices by Jean Abercromby, Cuthbert's relict.

There being another Petition given in to the Justices by Andrew ffindlay, indweller in Aberdeen and Jean ffarquhar his spouse, representing that, They being incarcerate within the Tolbooth of Aberdeen by virtue of an order issued furth by one of the Baillies, for the alledged Crimes of Theft and Receipt, and having continued in prison by the space of 6 months, notwithstanding that the Magistrates had not taken Caution to insist against them, and that they were willing to abide a legall Tryall and to find Caution for that effect. Therefore craving that in consideration of the premises the Justices would ordain the Magistrates to take Caution to pursue them, and Caution being found, to transport the Petitioners to the Tolbooth of Edinburgh, and the Magistrates of Edinburgh to receive them, and if no Caution be found, to sett them at liberty, they always finding Caution to appear when they should be called, which Petition the Justices grants.

Edinbr. 1 and 2 June 1670.

Mary Man Innes du Doul, indyted for Witchcraft, the Diet deserted.

James Campbell of Lawers as Cautioner for Ewen Cameron and others, ammerciate for not reporting Criminall Letters against Donald and Angus M^{c}Donalds for Slaughter.

Edinbr. 6 June 1670.

The Lady Rattar against Sir William Sinclair of Mey and others for Deforcement, declared fugitives.

Edinbr. 7 June 1670.

The which day the Action at the instance of M^{c}intosh of fforthar agt. ffergusones for Hamesucken, at length sett down and mentioned in the Diet holden 1 ffeb. last and continued to this day. And now Robert ffergùson of Burgdard compearing for himself and in name of the rest of the Defenders and his Procurators resuming the Alledgiance formerly proponed and written at the last Diet, to wit that the messenger executer of the Letters was deposed before the executing thereof, also representing that the Pursuer was a Prisoner in Edinbr. and not ready to insist, the Justices with consent of both parties and in respect of the Testificates produced under the hands of the Lyon and his Deputes, declaring that the Messenger was deposed at the time of executing the Letters and in respect also that the Pursuer will not undertake to prove that he was *habitus et reputatus* to be a Messenger, deserts the Diet.

Edinbr. 8, 10, 13, 14, 15, and 16 June 1670.

Home against William M^{c}Kay for Slaughter continued.

10 day Maxwell agt. Johnston for Slaughter, continued.

Jean Abercromby agt. John Catanach at the Mill of Logie, for the Slaughter of William Cuthbert continued, but William and James Catanachs, his brethren, are declared fugitives, and thereafter upon the 16 day John is declared fugitive and his Cautioner is unlawed.

Advocatus agt. Cannon[1] of Barley for Treason, continued.

The Lo: Renton agt. James Brown in Coldinghame, for lifting of Merch stones, deserted as to him, and the other Defenders, one of them dead and the other absent and excused.

Captain William Barclay against William Bettie in Drumwhinle and Alexander Bellie in Towie who were formerly declared fugitives and had now obtained suspension and relaxation by Deliverance of the Lords of Session and found Caution, and being relaxed and compearing and the Pursuer being absent the Diet is deserted.

Alexander Robertson agt. James M^{c}Ownie *alias* M^{c}intosh for Theft continued till the morrow, being the 16 day and then deserted, and James Urquhart, brother to the Laird of Meldrum, Cautioner for reporting the Letters is unlawed.

Edinbr. 17 June 1670. The Justice Clerk, Deputes Murray and Preston present.

[2] Home relict of James Murray, soldier, within the Castle of Edinburgh, against William M^{c}Kay, Taylor, and prisoner within the Tolbooth of the said Burgh, indyted and accused That albeit by the law of God and the law of the Nation, the crime of Manslaughter and the Committers of the same and all who are accessory thereto are punishable with Death and confiscation of their Moveables, and by the 12 Act 16 Parl. Ja. 6. it is statute and ordained that no person without his Majesty's Licence fight any Combat under the like pains. Nevertheless it is of verity that the said William M^{c}Kay having quarrelled with the said James Murray, did provoke and appeall him to fight with him in these and the like terms, viz. That he durst not fight with him if he were out of the Castle of Edinb^{r} and desired him to go out with him, and accordingly they went out together, the said W^{m} M^{c}Kay did go to Ninian Anderson, Indweller in Edinb^{r} and desired him to be his second or loan him his sword, and he having refused, he prevailed

[1] 'Cameron' in Adv. MS.

[2] Sir George Mackenzie in treating of duels refers to this case, and to the debate on the relevancy of the indictment and finding of the justices, as settling disputed points in such trials.—W.

with John Hampden to be his second and to go alongst with him to the Park of Edinb^r^ and there the said William and the deceast James Murray having drawn their swords, did furiously and with much animosity fight and combat with the other, in which Combat the said William did thrust the said James through the body and did give him many other wounds whereof he died, and so is guilty of the murdering and killing of the said James, and of contraveening the Laws and Acts of Parliament made against Murder and Combatting.

Mr. Patrick Home for the Pannell, alledges That he cannot pass to the knowledge of an Assize upon this Dittay, because he offers to prove that what the Pannell did was in his own Defence and that the Defunct was the first aggressor and did first draw his sword, and to evince this and that the Pannell had no evil intention when he went out, but that he went to walk in the Park only. Its offered to be proven that he went out without a sword. Duell.

Replys Mr. John Elleis, That he takes Instruments upon the Defence as its proponed whereby the Slaughter is acknowledged, ffor *hoc ipso* it is alledged that the Pannell killed in his own defence, it is acknowledged that he killed. 2° The exception of self defence is no ways relevant to elude the Lybell because self defence in law has never place but where the aggression is so violent and sudden that neither it can be prevented nor resisted without hazard of the invader's life, and where that does not concurr no accession of the invaded, but so it is the samen can not be subsumed in this case where it is expresly lybelled and offered to be proven that the Pannell did provoke the Defunct to fight, did go and seek for arms and in fury went to the Park where he killed him, and it were against all reason and of a dangerous consequence if the first drawing of a sword should absolve the party in case of an appointment, because by that means parties might appoint to fight and the provoker himself might keep in his sword till the other should first draw and take his advantage and kill him. 3° As to the pretence that he had no sword when he went to the Park, the same is no ways relevant seeing it is lybelled and offered to be proven that at the time of the conflict he had a sword and did kill him and the samen is a negative and contrary to the lybell.

Duplys Mr. Patrick Home for the pannel, that the alledgeance proponed for the pannel stands relevant notwithstanding of the Answer, 1° Because by the late Act of Parliament anent casuall homicides it is expresly declared that homicide in self defence shall not be punished by Death, and that notwithstanding of any laws or acts of parl^{t} or any practicque made heretofore or observed in punishing of Slaughter, by which it is evident that in all cases where Slaughter is lybelled without any distinction whither the same be committed *animo deliberato* or *in rixa, et ubi lex non distinguit non est distinguendum*. And if the Act of Parl^{t} should be otherwise understood it should be altogether elusory. 2° It is not only clear by the forsaid act of parl^{t} but likewise by the Common Law by which it is clear I. 3. ff. *de Justitia et Jure Ut vim, atque injuriam propulsemus. Nam jure hoc evenit, ut quodquisque ob tutelam corporis sui fecerit, Jure fecisse existimetur*, and doth not make a distinction betwixt Slaughter committed by way of Duel or otherwise. And likewise Julius Clarus on that subject is most express *quod in omnem casum occidens aggressorum se defendendo nunquam tenetur de occiso*. And whereas it is urged that self defence in this case cannot be pretended because contrary to the lybell, it is duplied 1° That granting there had been an appointment which is altogether denied, yet it does not follow that the Slaughter was committed *dolo malo*, because albeit the appointment might be the occasion of his going there, yet it was not the cause of the Slaughter. Just as if a man should send his servant to a certain place and if he should be killed by the way, the masters sending of the servant would be the occasion of the Slaughter, but not the cause. Or if two persons should make an appointment together, if when both came to the field one of them should refuse to fight, the other should endeavour to kill him, without all question if the person who refused to fight should kill the other, it would be esteemed to be done in his own defence. 2° *Esto* it were contrary yet notwithstanding the self defence ought to be sustained being founded on the law of nature and a positive law, for however in other cases where Defences are only founded upon presumptions in law, if they be contrair to the lybell they ought not to be sustained or

may be eluded by stronger presumptions in fortification of the lybell. But where the Defence is founded on positive law albeit contrair, it ought to be sustained.

Triplys Sir George Lockhart for the pursuer, that he oppones the lybell which is expresly founded on the Act of Parl. made against Duells and upon the law and inviolable practique of this kingdom, tho it had been a slaughter not committed in Duel, against which the exculpation insisted on is no ways relevant, ffor the Act of parl. made against Duells is positive that Slaughters committed therein are punishable by Death. And it were strange to suppose that a partie provocking to a Duel and provoking to a quarrel and going expresly there either with arms or without arms, by finding arms upon the place should kill the partie injured, that the same should not fall under the compass of the Act of parl. And beyond all question if such a preparative were sustained it were a compendious way to evacuate the said Act and to render the samen elusory and of no effect and to justifie and patronize the horrid and most unjust Murder that could,[1] it being no difficulty for a partie to find or secure arms on the place, which cannot take off the force of the said Act. And albeit its not controverted that both by our Law and the common Law, self defence is a relevant ground of exculpation and receveable not only in the case of Murder *in rixa* but on forethought fellony. Yet it is as uncontrovertable that self defence can have no place where it is lybelled and offered to be proven that the Slaughter and Murder was committed on provocation and where the committer of the Slaughter went upon design to quarrel, self defence in that case being doneright contrary to the qualification which is positively lybelled and offered to be proven. And there can be nothing imaginable of greater in congruity than to alledge that Slaughter committed upon design and by a partie provoking and going in the fury of his provocation, was committed in self defence. And all Law and Authority as to the case of self defence is clear that it is in the case of sudden aggression where there is *subitus impetus*, and the simple act of invasion or first drawing of a sword is not considered

Home agt. McMath for Slaughter in a Combat.

[1] 'that could not' in Adv. MS.

where there was a preceeding provocation given by the one and accepted by the other, and both in order thereto going to the place. In which case it were a strange evasion in the case of innocent blood and in a matter of so great importance to the publick peace of the Kingdome that so groundless a pretence that one of the parties first drew his sword, should be sustained to elude a Murder committed by the provoker and who came to that place on that design.

Quadruplyes Mr. Pat. Home for the Pannell, that he oppones the forsaid Act of Parliam[t] founded on the Common Law and Law of Nature, which makes no distinction betwixt Homicide committed by way of Duel or otherwise, and the question is not here, whether or not the Pannell be guilty of the Slaughter as the first provoker which is prog[1] to the Assize, but whether or not the exception of Self Defence ought to be sustained. 2° It is offered to be proven that James Murray was the first provoker, and if it should be otherwise sustained, the Act of Parliament should be altogether elusory, because how easie were it in all Lybells of Slaughter to alledge that the same was committed by way of Duell if it were no more but to take from the Defender his exception of Self Defence, so that in effect in no case the Act of Parliament should have place. 3° *Ex concessis* the Act of Parliament has place *in rixa* and notwithstanding in that case it is contrary to the Lybell and oppones the late practique of Captain Barclay's where the same Defence was sustained, albeit it was there alledged that Captain Barclay and his accomplices came there of purpose to fight.

Quintuplyes Sir Geo: Lockhart for the Pursuer, that it is not denyed that if the Lybell were on forethought felony in generall, Self Defence would be receivable, but where the Lybell is founded upon a speciall qualification of provocation, it was never sustained, and the reason of the difference is evident because in the first case Self Defence is not *contra substantionem lybelli*, but only eludes it in a quality which is but presumed and needs not be proven, whereas in this case, if the Defence were receivable, it is directly contrary to the Lybell and to that quality which must be proven, and the

[1] This word is blank in the Adv. MS.

inconveniences urged are of no moment, because it cannot be questioned but where a Lybell is founded on a qualification of provocation, it is relevant, but then the provocation must be proven, and that being proven, there is no shadow in Law or Justice that the pretence of Self Defence can be sustained to elude a Lybell founded upon a qualification of provocation. Interloq^r.

The Justices repells the Defence proponed for the Pannell as the same is alledged complexly and ordains the Dittay to be put to the knowledge of an Assize.

The Assize all in one voice finds the Pannell Guilty of the Slaughter lybelled, whereupon he is adjudged to be beheaded at the Mercate Cross of Edinb^r on the 29 July next. The Verdict proceeds upon sufficient probation be the Testimony of Witnesses.

Edinb^r 20 June 1670.

William Moir, Messenger, produces the Criminall Letters duely execute, raised at his instance against Angus M^cintosh son to Conage, and others for Deforcement, and takes Instruments on the production thereof, and protests for relief of his Cautioner, which the Justices admitted, and the saids Defenders not compearing, are declared fugitives, and their cautioners unlawed.

Edinbr. 25 June 1670.

Andrew Mowat in Loanmey against Pat. Dunbar of Blairy, for oppression. The Justices continues the Diet and ordains the Defender to find Caution for his appearance the 7 ffeb. next, to which day the said Action is continued.

This day Torquell M^cneill gives in a Petition to the Justices, making mention that he having accidentally lodged with some Thieves in ffalkirk, he was seized for one of their number after they removed, and imprisoned in the Tolbooth of Lithgow, from thence was transported by order to the Tolbooth of Edinbr. where he has remained prisoner for thir [1] weeks, in a miserable and starving condition, being infirm in body, and seeing the owner of the goods neither does nor will pursue him, and that he cannot lye in Prison, and is content

[1] Also blank in Adv. MS.

to enact himself to appear when called, therefore craves Warrand to the effect underwritten.

The Justices ordains the Justice Clerk Depute to direct Letters at the Petitioner's instance for citing the persons from whom the goods were stollen, or the Magistrates of Lithgow takers of him, to compear before the Justices the 2 of August next to insist against the Petitioner for the saids Crimes with certification if they faillie the Justices will take course for his liberation.

Edinbr 28 June 1670 and 1 July that same year James Stamphfield, Merchant in Edinbr. agt. Barbara ffinnick, his servant, for stealling and fireraising in manner contained in her Lybell here recorded. The Dittay being read the Pannell confesses the same judicially, and the Diet is continued till the 1 of July.

The said 1 of July this Action being again called, the same is continued to the 6th of that month, but in the mean time there being a Petition presented by James Stamphfield, complaining on James Comrie, Messenger, one of the officers of the Court, for demanding two dollars of him for his ffees, and because he would not give them, calling him English Slave and Dog and giving him other opprobrious language when he was no ways provocked, but on the contrary the Petitioner shifted him.

The Justices having called the said James Comry before them and he having confessed, they commanded him to prison till their farder pleasure should be known, and on the 11th he is suspended and craves pardon.

Edinbr 4 and 5 of July 1670.

Pat: Leslie in Newmill against Pat: Dunbar of Balnafairie, Sherriff principall of Murray, and James Wiseman, his Depute, the principal declared fugitive and on the 5th day deserted.

Sir Dougall Stewart[1] of Bute against James Jamiesone, Crowner of Bute, prisoner in the Tolbooth of Edinburgh, for the Theft of Papers, deserted.

[1] Second baronet, and father of the first Earl of Bute.

Edinbr. 6, 8 and 11 of July 1670.

The 6 day Stamfield agt. Phinnick, continued, also the Triall of Gavin Johnston. Stampfield agt. Phinnick his Serv^{t} for fireraising and Theft.

The said 8 day Sir Geo: M^{c}Kenzie Procurator for James Stampfield declares that he insists against the Pannell Phinnick *ad pœnam extraordinariam* and not for Theft, and the King's Advocate declares he concurrs and insists for raising of ffire.

The Justices finds the Dittay relevant for fire raising and ordains the same to pass to the knowledge of an Assize.

The Assize being sworn, my Lord Advocate produces the Pannell's own Confession taken in presence of the Justices, bearing that a head of a bed in her master's house being torn by her fault, she for fear that her mistress should cause her pay the loss, which she was not able to pay, it being of a considerable value, carryed a lighted candle to the room, and having taken the covering off the bed, fired it with the Candle, supposing her mistress would think it was done accidentally and immediately thereafter locked the doors and went out to the dwelling house where her Master presently lives. As also declared that she tore the covering to make a coat of it, and then fearing her Master would discover it, the Devill put it in her mind to fire it to conceall the renting of it, and condescends on all the ways and the severall times of firing by candles.

Upon this Confession and the probation of Witnesses, the Assize found the Pannell guilty of the fireraising mentioned in the Indytement, and thereupon she is commanded back to prison and on the 11 day the pronouncing of the Sentence is continued.

James Comrie craves pardon and is suspended for upbraiding James Stamfield.

Maxwell against Johnston continued till the morrow.

Edinbr. 12 July 1670.

Maxwell, Relict of James Armstrang and his nearest of kin against Gavin Johnstone for the Slaughter of her husband, deserted, and the expences of the present Witnesses modified.

Comrie, Messenger, reponed.

Edinbr. 13 July 1670.

Patrick Dunbar of Balnafairie against Pat: Tulloch, brother to Alex^r Tulloch of Tannachie for coming on the last of November 1666 to the pursuer's house in the company of Pat Roy M^cgregor and divers broken men in the Highlands, and stealling and robbing of the pursuer's goods. The said Pat. Tulloch and William Grant, another defender, declared fugitives, and the witnesses outlawed.

John M^cdonald oig in Balnacomb and others against John M^cAudie and others for Theft, deserted.

The said day the Earl of Caithness and Roger Mowat of Seyster as Cautioners for John Lord Rae, Hugh Monro of Thriboll, and his brother, that they should report the Criminall Letters raised at their instance against some of the Name of Sinclair in Caithness, unlawed and the expences of the witnesses modified.

Edinb^r, 26 and 29 July 1670.

The Earl of Glencairn and his ffactors against William Whyte, for Usury, first continued and then deserted.

Edinbr. 1 August 1670.

The King's Advocate against Cannon of Barley for Treason, continued, and the same day [1] Anderson, Relict of James Laurence against George Chalmers and his Daughter for the slaughter of the said Laurence, deserted.

Edinbr. 2 and 4 August 1670.

Margaret Rutherfoord agt. Cha. Robertson in Machan and his sons for oppression. The sons declared fugitives and the Diet deserted as to the ffather.

Edinbr. 8 and 10 and 11 August 1670.

Earl of Nithisdale [2] agt. John Allan in Glenson, indyted for

[1] Also blank in Adv. MS.

[2] John, third Earl and seventh Lord Herries.

stealling of a sheep from Walter Newall in New Abbay and 2 lambs from John Allan in Towston, and severall other Thefts whereof Advocation is raised and craved to be remmitted to Earl of Nithisdale's Court frae which it was advocate. E. Nithisdale agt. Allan for Theft. Sheep Stealing.

Mr. Pat. Home for the Pannell Alledges that there can be no Remmitt untill the Pursuer produce the Lybell and Minutes of the Court conform to the conclusion of the Advocation which craves that all these may be produced.

Answers Mr. William Maxwell, There is no necessity to produce the Lybell because the Advocation narrates it which was raised upon a double produced. 2° Home alledges that the pursuit ought to be advocate because the Crime of Theft is capitall, and Baillies of Regalities and Stewarts are not Judges competent to capitall Crimes but when the Defenders are taken with red hand. 3° This pursuit being first intented before the Baillie of Newabay and then before the Stewart of Kircudbright, and there being an Advocation of both to the Justices, it should not have been again intented before the Earl of Nithisdale's Bailliary, and being intented it ought to be advocate upon Incompetency.

Answers Mr. William Maxwell, 1° That Baillies of Regality are Judges competent to capitall Crimes at all times whenever the Pannells be taken, and suchlike Stewarts of Stewartries, and this pursuit being intented before the Earl of Nithisdale as Heretable Stewart of Kircudbright, he is therefore Judge competent whether the Pannell was taken red-hand or not. And whereas it is pretended that its already advocate from the Baillie of the Regality or Barrony of Newabay and therefore it could not be intented before the Stewartry Court of Kircudbright, the same ought to be repelled because the reason of this being that the Earl of Nithisdale is Baillie of the one and Stewart of the other, is no reason at all, for he may be competent for the Stewartry and not for the Bailliary.

The Justices notwithstanding of the Answer made for the Stewart of Kircudbright, Sustains the reasons of Advocation and Advocates the Cause to the Justices and discharges the said Stewart of Kircudbright and Baron of Newabay, and their Deputes, to proceed against the Pannell thereanent.

Eodem Die.

Hugh Wallace, Writer to the Signett, against Sir James Douglass, younger of Kilhead, and Mr. John Crighton, son to Crighton of Craigbourne for Hamesucken, deserted.

Edinbr. 16 August 1670.

Allan M^clean of Brolais as cautioner for Sir Alan M^clean of Dewart, is unlawed for not reporting the Criminall Letters, raised at the said Sir Allan and his Tenants their instances against Donald Cameron, Tutor of Lochyell and others.

Edinbr. 17 August 1670, Justice Clerk and Depute Murray present.

Pat. Leslie against Pat. Dunbar of Balnafairie for oppression in manner contained in his Dittay.

Sir Geo: M^ckenzie for the Pannell protests that in respect he compears and is willing to underlye the Law and that the Pursuer is not ready to insist, the Dyet may be therefore deserted.

Replys Mr. Alexander Birnie for the Pursuer, that the Pannell did formerly suffer himself to be declared fugitive when the Pursuer was ready to insist and had his witnesses present, and in respect he now compears by virtue of a Relaxation which is not intimate to the pursuer and without which he could not be ready to insist, therefore the pursuer ought to have a new Dyet allowed him for citing of a new Assize and witnesses.

Duplys Sir George M^ckenzie that Leslie is but accuser and an accuser ought still to be ready and its not usuall to intimate suspensions to accusers. And if he had pleased he might have known the Diet by applying to the Justice Clerk and craving a sight of the Relaxation.

Triplys Birnie, he oppones the Letters of Relaxation which contains a Warrand to cite the pursuer, and it was never yet heard of that a pursuer was burdned to learn of Diets of Relaxations by applying to the Justice Clerk.

The Justices repells the Alledgeance and Duply proponed for the pursuer and deserts the Diet.

Edinbr. 22 August 1670.

Patrick Wilson, gardiner in Glasgow, and John Bertrum there, being incarcerate in the Tolbooth of Glasgow for the slaughter of Janet Wright, they give in a petition to the Justices, representing that no person had found Caution to pursue them, and that they are willing to find Caution for their appearance before the Justices when they should be called, and therefore desires a Warrand to take this caution of them to sett them at liberty.

The Justices ordains Letters to be direct against the nearest of kin to take a day to insist with certification they would sett them at liberty.

Edinbr. 23d August 1670.

Thomas Boyd of Pinkell agt. James Miller for theft of some cloaths and a sword alledged stollen from the said Thomas.

The Justices ffinds the Dittay relevant and ordains it to pass to the knowledge of an Assize. The Pursuer declares he restricts the Lybell to an arbitrary punishment and passes from the pain of Death.

The Assise all in one voice ffinds the pannel guilty of the stealing of the sword and cloak lybelled in respect of his own judiciall Confession thereof.

The Justices ordains the pannel to be carried to prison, therein to remain till he receive sentence.

William ffinlay, prisoner in the Tolbooth of Edinbr. for alledged theft, sett at liberty upon Caution.

Edinb^{r} 26 August and 9 September 1670.

Patrick Wilson, gardiner in Glasgow and John Bertrum and Thomas Wilson there, prisoners in the Tolbooth of Glasgow for the alledged slaughter of Janet Wright. They obtained a warrand upon their petition to the Justices to sett them at liberty upon their finding Caution to appear before the Justices to underly the law at the said 9 September, and the said 9 September being come the Diet is deserted because no pursuer was ready to insist.

Edinbr. 15 October 1670.

The ffactors of the Earl of Glencairn against William Burngate and others in Douglas for Usury, deserted and the pursuers decerned in the expenses of the witnesses.

Edinb. 3d Novr 1670.

Mr. James Menzies, minister at Calendar, against Patrick McBeth and others for Deforcement. The Defenders declared fugitives and the Cautioners unlawed.

Edinbr. 6 ffebry. 1671.

A Commission of Justitiary to the Justice Genll Justice Clerk and 5 of the Lords of Session in place of Justice Deputs.

The which day compeared Sir John Nisbet of Dirlton, knight, his Majesties Advocate, and produced a Commission under his Majesties' Great Seal, dated at Whitehall 11 Janry. 1671, to John Earl of Athol, his Majesties Justice Generall, Sir John Home of Renton, knight, his Majesties Justice Clerk, Alexr Lord Halkerton, Sir James ffowles of Colintoun, Sir Robert Nairn of Strathvird, Sir John Baird of Newbyth, and Sir John Lockhart of Castlehill, to be his Majesties Justices in all Criminal Causes. Which Commission, at the desire of the Advocate, and by appointment of the said Justice Generall and Commissioners, is here reported, of the which the tenor follows.

Carolus, Dei gratia, Scotiæ, Angliæ, ffranciæ et Hiberniæ Rex fideique Defensor: Omnibus probis hominibus suis a quo presentes nostræ literæ pervenerint salutem: sciatis nos per commissionem nostram sub magno sigillo regni nostri Scotiæ, de data vigesimo nono die mensis Septembris anno Dom. millesimo sexcentesimo sexagesimo nono auctoritate et potestate nostra, munivimus quosdam nobiles aliosque, dominos nostri Secreti Consilii et Sessionis inibi specificatos, consilium inire et deliberare de Curia Justitiariæ aliisque judicatoriis in eadem enumeratis de que regulatione earundem, ac stabilire istius modi regulas et ordines sicut illi necessarios judicarent, ad fines inibi expressos, quinetiam ordinavimus dictos Commissionarios seriem eorum progressus nobis scripto renunciare, ut nos tale

remedium eatenus adhiberimus, quale regali nostrâ prudentiâ idoneum videretur. Et quod antedicti Commissionarii in prosequenda dicta commissione, post diversas congressus consultus optimis et paratissimis modis prosequendi nostram regalem intentionem pro emolumento et alevimento nostrorum subditorum assensum probavimus etc.[1]

Edinbr 7 ffebry. 1671.

Patrick Dumbar of Blairy is declared fugitive for wounding, beating, and wrongous incarcerating of Andrew Mowat conform to the Criminal Letters raised at the said Andrew's instance, but James Innes, his Cautioner, is excused because he compears and alledges that he was only verbally bound to present Blairy in the Clerk's Chamber.

Edinbr 13 ffebry. 1671.

The said day the Lords Commissioners of the Justitiary appointed Castlehill and Newbyth two of their number, to meet at the king's Advocate anent the examination of prisoners within the Tolbooth of Edinbr and to report their Dilligence.

Act anent receiving of prisoners within the Tolbooth of Edinbr, for crimes.

The Lords Commissioners of Justitiary having taken to their consideration that there are many persons brought prisoners to the Tolbooth of Edinbr against whom there is no probation, and no person compears to insist, and they having nothing whereupon to live and like to starve, therefore they think fitt that the Magistrates of Edinburgh receive no prisoners from any person unless the bringers of them not

[1] This is only a part of the Commission, which is given in full by Baron Hume in the appendix to his *Criminal Law*. It appoints the Lord Justice Clerk as one of the judges, which office he had only held by Act of Council, dated 6th December 1663, and the other judges named take the places of the justice deputes and assessors who had previously sat with the Lord Justice Clerk and justice deputes in the court. The statute of 1672, cap. 16, 'Concerning the Justice Court,' provided that the office of justice depute should be suppressed, and 'that the Criminal Court should consist of five of the Lords of Session added to the Lord Justice General and Justice Clerk, of whom the Justice General, and, in his absence, the Justice Clerk, shall be President, and in default of these, any one of the Bench chosen by themselves.'—W.

only find caution to maintain the prisoners but also to insist against them for the Crimes whereof they are indited.[1]

Edinbr. 21 ffebry 1671 all the ffive Commissioners present.

Mr. William Nimmo, Baillie Substitute of the Regality of Glasgow, against James Ker, in Capoch for the crime of Theft specified and contained in the Inditement and in the advocation thereof raised before the Lords of Justitiary. The Advocation being this day called and the reason insisted on being that the said substitute had not power, because any substitution he had was expired, in so far as Sir Dougall Steuart of Bute, the principal Depute, from whom the substitution flowed, is now dead. To which it being replyed that Mr. Nimmo's commission proceeds from the Duke of Lennox himself, the Commissioners of Justiciary did take Mr. Nimmo's oath of Calumny upon the reply, because his Commission was not in town, and he having deponed affirmative, they continued the Diet.

In the new Session house of Edinburgh 6 March 1671, the five Commissioners present and the Lo. Halkerton preses.

Casting down of Houses.

Elizabeth Rutherfoord, relict of umq[ll] Andrew Ereskine, portioner of Tillelberet, and Margaret Ereskine, his daughter and appeiring heir against Charles Robertson of Nathrono, Donald and Charles Robertsones, his sons. The libell bears that where notwithstanding by the Laws and Acts of Parl. and constant practicque of the kingdom, the Convocation of his Majesties Leiges in feir of weir without warrand or commission, is prohibit under great pains and punishments, as also the oppression of the leiges, assaulting and breaking of their houses, beating and wounding of their servants, possessing of their lands and robbing of their goods, are heinous crimes and severely to be punished, nevertheless

[1] This Act of the Commissioners of Justiciary led to the Representation by the Convention of Estates, in 1689, regarding 'exorbitant bail and imprisoning persons without expressing the reason thereof, and delaying to put them to trial'; and to the Act of 1701 'For preventing wrongous imprisonment, and against undue delay in trials.'—W.

in the moneth of January and Febry 1, 2 and remanent days thereof 1660,[1] the fornamed persons having convocate fifteen persons in arms, came to the said lands Tillelberies pertaining to the said Elizabeth Rutherfoord and her mother, and to that part thereof called Leid Backie, and there took possession of the forsaids lands by force of arms and beat and wounded the servants, and on the of November thereafter came to the dwelling house of Tillelberies and did violently break down and demolish the same and destroy the offices, houses thereto belonging, and in June 1670 they came to the ground of the saids lands and wounded David and Alexander Kumeirs,[2] two of the tennents. Of the crimes abovewritten, the said Charles Robertson and other persons forsaid are Actors art and part, at least the same was done by the instigation, hounding out, command, assistance and ratihabition of the saids Charles Robertson, who to testify his guilt and accessson thereto immediately before committing of the Crimes, harboured and sheltered the persons actors and committers thereof, within his house, and entertained them kindly therein. And he having asked them what they had done, and they having made known to him, he was altogether displeased and said they had done too little for there was as much for a buffet as a barkfull of strokes, and that he would have thanked them if they had haged an spail of the tennents cheecks, does evidently make appear and evidence the said Charles his accession to the committing of the forsaid crimes which being found by ane Assise—the Procurators for the Pursuer craves that the Dyet may be continued because James Potter, the principal witness, is absent. Answered by the Procurators for the Pannell, that James Potter being already examined before the Justices, both the Pannell himself and they as his Procurators consents that that Deposition be received and be probative, and that the Assise proceed as if the said James had deponed in presence of the Assise.

If a witness not examined in presence of the Excise be probative.

The Commissioners of Justiciary in respect of the consent of the Pannells and his Procurators abovewritten, declares that the said Deposition already taken shall be as legall

Interloquitor.

[1] 1660 also in Adv. MS. Should be 1669.

[2] Kinmuirs in Adv. MS.

probation as to the Assise as if the said Deposition were taken in their presence.

Observation. Observe here that seeing the Commissioners founds their Interloquitor upon the Consent only and therefore they judge not that Oath without the Consent to be probative. 2° Observe all Dilators should be proponed before the Assise be sworn, for so it is here.

If minority does excuse against the casting down of a house which the minor's father claimed right to. The Assise being lawfully sworn and no objection in the contrary—Sir George Mackenzie for the Pannells, Charles and Donald Robertsons, alleadges that they cannot go to the knowledge of an Inquest upon that part of the Lybell anent the casting down of the houses, because casting down houses of it self is not a crime, but as they belonged to this or that man, and they are not of the nature of murder or adultery, which of themselves are crimes, so that if it shall be made appear that the houses belonged to their father, and not to the Pursuer, then they must be assoilzied because they cast down but their father's houses, yea they must be excused if it shall be but made appear that their father had a colourable tittle cled with possession. That must excuse them to defend against a Crime, because they are but minors and could not know the nature of rights, and might have assisted their father who is lybelled to have been the principall agent, and true it is that their father had a sufficient right, at least a colourable tittle, viz. a compriseing cled with possession.

Replys Sir John Nisbet, his Majesty's Advocate, that he declares that the Pursuer insists on the second member of the Lybell, and the demolishing of the house the way lybelled in Anno 1669, and as to the Defence, the same is nowise relevant, seeing the pretence of age cannot priviledge Minors to committ Crimes where they are *puberes et doli Capaces* and the father's right by possession and compriseing is of no weight, seeing whatever right he might have had from any person, he cannot upon pretence thereof in a riotous and oppressive manner demolish the house possessed by Elisabeth Rutherfoord, the Pursuer, against her will, but the truth is in this case there is not the least shadow of a coloured tittle, in respect the Pursuer has the undoubted right to the houses and lands lybelled, and the time of committing of the deeds

lybelled, the same were possessed by her and her tennants and namely by John Jolly, upon whom the said violences were committed, and the same was committed upon him of purpose to fright the Pursuer and to cast the lands waste.

Duplys Sir George M^cKenzie for the saids Charles and Donald Robertsons, that he oppones his Defence, and it were a dangerous preparative that bairns about 14 or 15 years of age, at the grammar school, going upon that information that a house belonged to their father should be overtaken for demolishing it, and being of this age, they cannot be presumed to have acted *dolose* where the act it self is not a notorious crime of that nature which necessaryly and apparently demonstrates the Committers to be guilty of *Dole* as where pregnant contrivances are proven, or where the crime committed could not admitt of a favourable interpretation, which cannot be alleadged in this case. And also there being here a colourable tittle, to witt the appretiation of the houses and timber and a possession thereof conform as said is, it were against the principles of common equity and reason as well as this of Law that an act so indifferent and which cannot inferr guilt but upon the accompt of the circumstances that attended it should inferr a crime, and the appretiation and possession thus founded on is thus cleared, that the Pannell Charles Robertson, elder, father to the other two pannells, having gotten an tack of Tillelberies, and having entered to the possession at Whitsunday, notwithstanding of his entry the said Jolly, the preceeding tennant did leave one of the cottages untaken down till Martinmas, at which time a great storm having fallen which gave the Pannell a necessary occasion for that cottage he behooved therefore to take possession of it, but first he caused honest men comprise it and the price was but six pounds, and after this compriseing and possession, Jolly, the pursuer's tennant, alleadged to be injured, did come to the said house and did violently throw it down when the Pannell was lying sick at Elliot, and carried away the timber to Tillelberies in the time of storm, so that the pannells beasts, being exposed to the storm, and some of them having died for want of a shelter, the Pannells if they did pull down the

house upon the ground of Tillelberies, which is denyed, it was a house erected of that timber and was pulled down *ex incontinenti* or soon after it was erected, and the pannells were necessitate to do it and the timber was the same which was apprised in manner forsaid to Charles Robertson, elder, and so they might have pulled it down and tho' this were not a Defence of it self sufficient to elide the lybell, yet it is sufficient to excuse the two minors to whom the Law allows not Judgement, that having heard of their father's right and possession of the house, they might have supposed it lawfull for them to bring back the timber which had been taken from it. And as to both of the sons, it is positively offered to be proven that they were not fourteen years of age, and so are not punishable nor cannot pass to the knowledge of an Inquest by our law except in attrocious crimes, as was expressly found upon the 26 August 1612 in the case of Middletoun and Mauhar[1] and the 10th Janry 1662 in the case of John Rae.

Triplys Sir John Nisbet his Majesty's Advocate, that the former answer as repeated and the Law not only presumes but defines and is positive that *Puberes* and *Pubertates proximi* are capable of dole and of crimes, and the deeds and circumstances lybelled are evidently such as demonstrates both the attrocity of the deeds lybelled and the guiltiness of the saids Pannels, viz. the convocation of the king's leidges and a number of men in arms with guns, pistolls and swords and other weapons and coming a brastling manner to the pursuer's ground and house, and violently pulling down and demolishing the saids houses, with the other circumstances lybelled. And as to the alleadgeance concerning Tillebirny and John Jolly's being tennant there and takeing away the timber from the said house, the samen is of no weight seeing whatever was or might have been betwixt the Pannell and Jolly as to Tillybirny, the same could be no pretence or warrand to the pannell or any other person in his behalf or by his instigation, to come to the pursuer's lands of Tilliberot and to pull down a house built upon the same, and tho' there had been any other timber in the rooff or

[1] M'Lear in Adv. MS.

any other part of the saids lands of Tillyberiot that did belong to the Pannell, as there was none, he might have pursued Jolly for the value of the timber and for damnage and interest, but could not lawfully upon the pretence forsaid demolish the said house belonging to the pursuer. And it is clear by the Law *de tigno juncto*, but the truth is that not only the timber of the said house being a compleat house consisting of couples and other materials was taken away, but the saids houses were in a most insolent way razed and pulled down to the ground, and whereas it is pretended it was *tanquam ex incontinenti*, it is frivolous for the reason forsaid, and false, seeing the saids houses were compleatly built and so could not be pulled down *ex incontinenti* as said is, and as to the practiques they are not shewn *et de his quæ non sunt et non-apparent idem est judicium* and if any such thing can be made appear to have been done, the samen might have been done *de facto* and upon considerations. But it cannot be instanced that this Defence being proponed and ther replys and answers made to the samen it was repelled.

Quadruplys Sir George M^c^kenzie that tho in atrocious crimes or when the act appears palpably to be criminall, lessage inferrs not a liberation from the guilt but only a mitigation of the punishment. Yet in this case the *Titulus Coloratus* alleadged, one were sufficient to defend a spolio much more from a riot. Nor could a person of that age be oblidged to debate or consider how far *tignum junctum* and how far demolishing *ex continenti* or the nature of possession here contraverted could reach. All these requireing a firmness of judgement which the Law allows not to minors in any case, and seeing they could not be civilly overtaken for want of it much less criminally, and except it can be alleadged that the bairns came there armed, their naked being there is not relevant, for it shews a want of *Dole* and design as to convocation it is denyed, and there is very great reason why minors of that age should not be put to a tryall, seeing they may *infirmitate ætatis* ommitt a most relevant Defence, or not understand how to mannage their tryall, and which may be a great disadvantage to them suppose they were innocent.

The Commissioners of Justiciary declares that before they

Interloqr. give their Interloqr as to the forsaid Debate they will hear what Defences are proponed for the father on pannell.

The question in the following Debate is how far command, hounding out and receipt can inferr a guilt against the commander and recepter before the principall actor be discust.

Mr. David Falconer for the Pannell Charles Robertson, elder, alleadges that he cannot pass to the knowledge of an Assise because he is either conveened as principall actor, in which case he offers to prove *alibi*, and if as hounder out he cannot be pursued because the principall actors are not conveened, but by the contrary they are cited here as witnesses, seeing if the principall actors were assoilzied, the accessories hounders out, assisters or recepters were likewise to be assoilzied, and the samen was *in terminis* found in George Graham's case and the Lady Barefoot, and as to the qualification condescended on in the Lybell viz. resetting of them in his house after the commission, the speaking of the words lybelled, the same can inferr no accession to the crime, seeing any of the persons here having had such provocation as the pulling down of a house in the time of storm, in his absence might have spoken so much, and a crime could not be concluded against them. And as to the simple receipting of them in the house, the same is no ways relevant, seeing its offered likewise to be proven that he was not at home, but was at Elliot lying sick both before and a considerable time after their coming into the house in his absence, cannot inferr guilt against him.

Sir Geo: Mckenzie for the Pannell adds That as to the qualifications condescended to inferr the guilt in so far as he commanded, hounded out or receipted the Committers, it is clear by the 26 cap. 4 Book of the Majesty that by our Law no person can be accused upon any such assertions till the principall committer be first discust and put to the knowledge of an Inquest, ffor that chapter being *De Ordinis cognitione in criminibus* it is said in the 4th verse of the said chapter *Quod præceptor vel receptor non respondebit antequam assiza procedit super principali actore*, and Skeen upon that chapter gives it for a general Rule that *complices criminis non possunt accusari antequam principalem actorem*, which is likewise reasonable seeing the actors might have proponed a Defence which might have assoillzied them and the Receepter.

Rutherfoord agt. Robertsons for casting down houses.

Sir John Nisbett,[1] his Majesty's Advocate as to Charles Robertson's Defence Answers That the Lybell is opponed bearing that the said Charles is art and part of the crime and deeds lybelled, which by the Act of Parliament is relevant without any qualification or distinction whether the Defenders be principall actors or otherwise accessory. And whereas its pretended that the acts and qualifications as lybelled does not inferr the crime lybelled in respect it is alledged that he was absent for the time and did not concurr in person for doing of the deeds lybelled and the coming of the actors from his house immediately *ante delictum*, and they returning thither again after the same and the specialities lybelled does not inferr his guiltiness of the Lybell, and the circumstances therein contained are opponed, being most strong and pregnant qualifications as can be in any case, seeing it is lybelled that the Pannell and the other persons that did committ the saids crimes were the said Charles, his children, nephew and divers of his domestick servants. And it is acknowledged that what was done was done in behalf of the said Charles and upon account of his right and interest and immediately before the forsaids deeds were done. It is lybelled and will be proven that a party of Highlandmen came to his house and went from the same about the time of the committing of the said crime, at least that the saids children, nephew and servants did go with and accompany them and did concurr with them in committing of the saids deeds, and after committing of the same they returned as said is immediately to the said Charles his house and were kindly entertained therein, and tho the said Charles had been absent for the time, he might have been accessory to the committing of the saids deeds in manner lybelled, and it appears that his absence was of purpose to palliate his guilt and accession, as if the saids deeds had been done in his absence and without his warrand. And whereas it is pretended that he was 6 weeks before and after the doing of the saids deeds, the Lybell is opponed, and it is offered to be proven that immediately before the doing of the saids deeds,

[1] Nisbet was Lord Advocate from November 1664 until 1677. Mackenzie was appointed his successor upon 23rd August in that year. Nisbet seems to have been too corrupt even for the Restoration period.

at least a very short time before, the space of two or three days at most, he was at his house, and after he went away the saids Pannells came and that he returned immediately thereafter to his own house, at least a very short time be the space of 2 or 3 days.[1] And he was so far from disowning the saids deeds, as he ought and would have done if his servants had been free from accession thereto, that he keeped the servants, children and nephew still in his company and family, and do still defend them, and does employ Advocates upon that account. That the same was done upon the pretence forsaid of his right and interest, and was so far from giving the least check to his children or servants that he did not at most expostulate with them that more was not done in the terms contained in the Lybell, which being joined with so many circumstances, doth clearly demonstrate the said Charles his guiltiness. And as to that speciall act of the Majestie, the abovewritten Answer is repeated, founded on the Act of Parliament, and the said Charles his children are at the Bar and principall actors, and in regard of the great inconveniency that did arise upon the pretence of principall actors and accessorys and that distinction the Law of the Majesty is abrogated by the said Act of Parliament.

The Lords Commissioners of Justiciary continued the pronouncing of the forsaid Interloq^{r} to the 9th of March instant and ordained Witnesses and Assizers to be present and cautioners to continue obliged to that day.

There is no more marked upon this day except the deserting of a Process for Usury at the instance of the ffactors for the Earl of Glencairn agt. John and Robert Cairns in Leithree.

In the New Session-House of Edinburgh, 9 March 1671, the five commissioners present and the Lord Halkerton elected preses.

Intran. again Charles Robertson and his two sons, the King's Advocate and pursuers declare they insist only for the

[1] '3 or 4' in Adv. MS.

Convocation and casting down of the houses libelled in the way and circumstances lybelled.

Continuation of the above Debate betwixt Rutherfoord and Robertsons for casting down houses.

Sir. Geo: M^c^kenzie for the Pannell Charles Robertson, elder, Duplys in answer to my Lord Advocate's reply made by him at the last Diet, that tho by the Act of Parliament airt and part be sufficient qualification of guilt and be sufficient to make a Lybell relevant, yet that act does not abrogate the Law of the Majesty which is founded on so evident and convincing reason, ffor these two Laws are *materia diversa* and most consistent in so far as the Law of the Majesty determines the order of cognition and triall, whereas the Act of Parliament determines only the relevancy of the Lybell when it comes to a Trial. And as they are very consistent and the one does not expresly abrogate the other, so since that Act of Parliament it has been uncontraverted that Receipts has never been found relevant untill the principall Actor had been first discust, and that it is impossible by our Law to be otherwise is evinced from this reason, viz. commanding or receipting does presuppose that the crime was committed according to the command or before receipting by the persons commanding or receipted *et prius constare debat de corpore delicti*. But so it is that probation cannot be led to prove that the person commanded or receipted committed the crime except he were present and found guilty by an Assize, ffor which the Law of the Majesty did very well find that the principall party ought first to be discussed and found guilty be an Assize before any person could be tryed as Preceptor *vel* Receiptor. And if it were otherwise, not only might the person pannelled for accession be precluded from most just defences which he could not know, but likewise a crime might be concluded against absents contrary to the fundamental Laws of this Nation. Nor is it relevant to say that the Bairns were principall actors because they and Bairns being themselves of less age *nec puberes* they may ommitt competent Defences, especially seeing where the *medium concludendi* is matter of right and possession, and where they cannot so much as understand how to object against Witnesses, and it appears very evidently that all this affair is managed upon mere design to ensnare the children,

and by them the ffather, without the advantage of a fair and legall Trial, seeing tho 15 come to age were lybelled to have been committers, yet the two children are only persewed. But as to them it is positively offered to be proven that they were informed that the Timber belonged to their ffather and that they might justly have gone, which information to persons who did not understand themselves the matter of right and possession, was sufficient for an act which of its own nature is not against the Known Law of Nature, or which of its own nature is not such an Act as appears clearly to any rationall person of that age to be criminall, and in effect is but just the case as if children should be desired by their ffather's servants to take back the cattle from persons who were designed to them Thieves and Robbers in which tho they concurred upon that perswasion without debating the matter of right or that punctilio of Law *ex incontinenti* would be sufficient to defend them, and if the other 13 who were intelligent persons had been called they might have alledged and proven, that either by consent of the party wronged or his acknowledgement of the right or some such other Defence as would have cleared him, which certainly might have been and not communicate to the children whom they did not think concerned. 2° Tho the Bairns could be tried yet they behooved to be first found guilty be an Assize before the ffather could be put to the knowledge of an Inquest, ffor if the children were put to the knowledge of an Inquest and assoillied, then it would appear that there were no principall party called, and so the Justices could not but find that they had done wrong and therefore *donec constet* by the verdict of an Assize that a crime was committed, the ffather as commander or ratihabiter cannot go to the knowledge of an Inquest and to the command itself *ubi pœna est pecuniaria* tho a command be only probable by oath no more than in a civil case ffor *nuda emissio verborum* being variable according to the severall permutations as well as placing of the words, the words may be mistaken as to the receipting of the bairns, tho they be proven to be actors, yet the receipt of a man's own children *non relevat* except command be proven except these were letters of intercommuning, or at least that they were denounced fugitives, ffor else the receipt-

Rutherfoord agt. Robertsons for casting down of houses.

ing of a man's own children being *pietatis paternæ* lawyers do not make it a guilt except in the case of command. As to the recept of servants *non relevat* to inferr a guilt except in the cases of command or Letters of Intercommuneing or being fugitives, they being necessary servants. As to the word Ratihabiting, the same *nullo modo relevat* to inferr a guilt except a prior command be proven, for *verba jactantia* or extorted thro former injuries done in pulling down his house, deserves no punishment, and there is nothing more ordinary when a riot is committed than for persons to say there was not a tint stroke or that they did twice as much, or the like words, which were a very dangerous ground to inferr a guilt, but as to all the circumstances following the act of ratihabition or resetting before Letters of Intercommuneing, it is alleadged in law that they cannot be counted art and part, it being very clearly the opinion of Lawyers that *statutum dicens præstans auxilium Consilium vel favorem maleficio eadem pœna puniri debet*, as our Acts of Parliament *intelligi debet quando maleficium est infieri secus autem in maleficio facto et consummato nisi auxilium sive consilium fuerit causa maleficii*, and these being but presumptions, a crime cannot be inferred from them, seeing crimes ought to be proven and not presumed, for since the father might have been innocent of the committing of the crime notwithstanding of the circumstances *per possibile conclusio semper debet sequere debiliorem partem.*

My Lord Advocate Tryplys that he oppones the Lybell and Act of Parliament and the former Replys and other Answers made in fortification of the Lybell, for the acts lybelled are such as are obvious to all persons of what age soever to be illegal and unwarrantable acts, that is against the Law of Nations, without any pretence whatsoever, by way of convocation *vi armata* to pull down houses *invito possessore*, and by the law of this kingdom, all persons accessory to any crimes, whatever there accession be *tenentur in solidum* and may be pursued together or *separatim.* And there is no inconvenience in this case, seeing all the Pannells are called as principalls and art and part, conform to the Act of Parliament. And if no inconvenient *ante delictum* should be proven presently, which is offered to be proven, and that the

father's accession should be proven and[1] tried *simul et semel* before the Assise. And as to that part of the alleadgeance anent the order and command, cannot be proven but by Write in itself, is most unwarrantable, contrary to the Law and practique, seeing in Law and by the constant and uncontraverted practique of all criminall Judicatories *mandatum* is proven by witnesses, and if this were not, a great inconvenience should follow that *mandatum* which is *causa delicti*, and a clear act of guiltiness could never be proven seeing it cannot be presumed that any person could be so void of reason as to give a warrand in write to committ a crime and villany, and seeing crimes may be committed *verbo* as well as *facto* as in the case of seditious speeches and in the case of treasonable contrivances and such others, and in the case of giving a mandate to go and committ a crime, makes out without all doubt that crimes which are and may be committed *verbo* may also be proven *verbo* and by witnesses. And as to the rest of the forsaid Answer made for the Pannels, the Lybell and former Answers made for the Pursuers, the qualifications of the fethar's guiltiness, which are most clear and pregnant, are opponed.

Quadruplys Sir George M^cKenzie that the Act of Parliament can give warrand to dispense with that which is a positive Law not abrogated expressly, and if it were sufficient to insist against him as Principall, that uncontraverted maxim in our Law, and so often inculcate, that the resetter could not be punished before the Theif, were absolutely useless, for my Lord Advocate might still declare that he insisted against the resetter as art and part. Likeas the inconveniencys above cited of proceeding against absents and leading probation against them in their absence, and if there were a lybell bearing expressly that the pannell ratihabited a murder committed by any other, certainly that other behooved to be condescended on, and it behooved to be proven that that other committed the crime, so that probation in that case behooved to be led against an absent, which probation would certainly ty the witnesses who deponed if they were called to

[1] 'proven and' not in Adv. MS.

another process to renew their Depositions, and which might by consequence *gravare famam* and infer very great prejudice and hazard to the party absent. And seeing the Law of the Majesty in this point so express and founded on so rationall principles except it were expresly abrogate, it must stand in vigour.

The Justices notwithstanding of all the Alledgiances proponed for the Pannells, Donald and Cha: Robertsons, finds the Dittay as it is lybelled relevant against them and ordains the same to be put to the knowledge of an Inquest. Interloqr against the sons.

The Justices repells the Defence proponed for the Pannell Charles Robertson, elder, and finds the Dittay relevant as it is lybelled against him and ordains the same to pass to the knowledge of an Inquest. against the father.

Sir Geo: M^c^kenzie alledges that none of the Witnesses cited in this process can be admitted against the Pannells, because its offered to be proven that they are *socij criminis* and were the down casters, at least present thereat and were of the number of the 15 convocate for doing thereof. Debate against the witnesses.

My Lord Advocate Replys that the objection was no ways relevant in respect no person can be witness except these that were present at the committing of the deeds lybelled, and the witnesses might have been present without any accession to the saids deeds, and tho they had been present by way of accession, yet they may and ought to be witnesses, seeing the case in question is not the case of capitall crimes importing infamy and incapacity, but the case only of a riot punishable *pœna arbitraria et extraordinaria*, in which case the saids persons may be witnesses, since they are not conveened as actors themselves and associates in the cases of the nature forsaid. They tho they were granted to be *socii* or *socius*, tho he cannot be witness in behalf and for the exculpation of a *socius*, and a person that is accessory to the deeds, yet he may be a witness against him, seeing their is neither Law nor reason in such cases *ubi non agitur de crimine capitali aut de crimine roganti infamiam* but *de dilecto* and of a simple ryot where there is neither law nor reason that can disable the persons forsaid to be witnesses. And in law all persons *quibus non interdicitur testimonium et qui non prohibentur admittuntur*. And the reason of the Law is

grounded thereon, persons may be disabled as witnesses are only either relations for the pursuers or the interest of the person who is used as witness, so that he may either tyne or win or the quality or capacity of the person used as a witness, because he is either infamous being *irritus crimine capitali et inflamantiæ* or such a person as *non legum terræ* and is intestible, none of which is in this case, seeing the persons used as witnesses are no ways related to the pursuers and they can be in no better or worse case by the issue of this proces and by the contrair if they had been accessory to the deeds lybelled and had been acting and assisting to the pannells for the time in doing of the saids deeds in behalf of the said Charles Robertson, which is rather to be presumed they will declare in their favours, and that they have *legum terræ et beneficium testimonij*, seeing tho they had been accessory to the doing of the saids deeds, and tho their had been a criminal sentence against them for doing of the same, yet it is out of all question that if an incorporated testimony in all cases criminal and civil seeing such a sentence *non irrogat infamiam*, and if in other cases there is no question but the more in this case where they are not concerned as to interest or relation.

Duplys Mr. David ffalconer, that notwithstanding of what is alledged, yet the objection stands relevant, because that the reason why they cannot be witnesses against the pannel is, because the pursuer has them under the fear of a criminal pursuit. And if they do not depone answerable to his expectation he may intend a new pursuit against them. And if they were actual pannells, there is no question they could not be received, ffor where it is made appear that they might and ought to have been actual pannells and are also if not more guilty than those on the pannel of the said crimes, the pursuers palpable colluding with them in omitting to pursue them, cannot prejudge the present pannells of their objection. And albeit that the crimes lybelled be not capitall or does irrogate *infamiam* so as simply to incapacitate them *in omni causa* and to make them altogether intestible, yet *quoad* this lybell the objection is sufficiently relevant to lay them aside as to this, specially seeing its offered to be proven by their

own Depositions that they were not only accessory but actors, and so being *majores* or more guilty then the pannells who are *minores*, it is apparant that it is a contrivance betwixt the pursuers and the witnesses that they should be miskenned of purpose to fix the guilt against the pannells.

Sir Geo: M^c^kenzie adds, that he remitts to the Justices to consider why the principall parties are not called, for the true reason was that they were past from or at least were not insisted against upon design that they may be led as witnesses, so that they are most suspect of all other *Socij* seeing the pursuer has put himself to the hazard of an Interloq^r^ of not pursuing the principalls purposely that he might gratify them. But as to the objection it self, no Lawyer can contravert but regularly *socius criminis* is not a witness. And by the 34 cap. of the 2° Stat, Rob. 1. *Socij et Participes ejusdem criminis* are without distinction repelled, *et ubi lex non*, etc. but if *socij criminis* were at all to be received, the only exception is *in criminibus exceptis* such as lese-majesty etc. Likeas by an express act of Sederunt the Lords of Session upon an application made from the Justices and Council except Treason with us in the generall rule *et exceptis non exceptis*. And if it were otherwise it were of most dangerous and inevitable prejudice, for by gratifying two of the actors they might fine persons innocent—*transferre in alios pœnam*. Likeas lawyers only allow *Socij criminis* to be interrogate *in criminibus exceptis*, but in other cases they require that the *Socij* deponing depone upon the torture, and even then *ipsorum testimonia faciunt tantum indicio*. And as to the prejudice alledged that crimes could not otherwise be proven, it is answered, that better an hundered crimes be not proven justly then that one crime should be proven unjustly *et incommodum non solvit argumentum*, but there is no *incommodum* in this case seeing the crime pursued is not *crimen ex sua natura occultum* which could only pretend to that privilege, but it is alledged to be a *delict* committed in the day time in a countrey done in a hostile manner *vi armata*, not a transient act but behooved to continue for a considerable time, such as the dinging down of a house and in a town where there were many houses and people. And as to that part of the alledgeance that *socius sed non pro*

Sociis,[1] the alledgeance is against the express law cited and contrair to the opinion of Lawyers on that subject *nisi in criminibus exceptis et occultis*, nor does the law make a difference whether the crime inferr a capitall sentence or a pecuniary mulct *ubi eadem ratio ibidem jus*, but if a distinction were to be made it behooved rather to be just contrary, seeing the common wealth is more concerned to have great crimes proven then small ones. Likeas on that account the law does expresly except such crimes as it does except, and specifies as the reason of the exception *maxima republicæ interesse* cannot be alledged that thir witnesses may not lose or win, seeing if this were relevant it militates as well in all crimes as in lesser crimes. And yet it is acknowledged that there the law does admitt *socius criminis* but that they may win here is clear because they may be past from by the pursuer, and the ordinary objection against a witness is that he has lost or may win. Likeas actually here they have win in so far as they have not been pursued, being principall actors and thir exceptions must be founded on express statutes, seeing the rule is so founded by the former statute.

My Lord Advocate Triplys, that where it is pretended that the persons used as witnesses are concerned in so far as they may declare partially to be free of the trouble and apprehension of being pursued themselves, and that it is evident there is a collusion betwixt the pursuer and the saids persons to the effect forsaid, in respect they being *actores et majores* are more guilty then the defenders, they are not pursued, and that the crime in question is not an occult crime, that there is no penury of witnesses. ffirst the said Defence of the fear and apprehension forsaid is not relevant, seeing the deeds in question being of that nature that are not capital where there is no hazard of life or limb, the apprehension of *metus* and being pursued for the same, are such that are not incident *constanti viro* and whereof the law takes no notice to decline a witness. And altho the lybell should be proven by their own testimony, they may notwithstanding be pursued and their own confession

[1] In Adv. MS. 'that *Socius criminis* may be received against *ejus socios sed non pro Socijs*.'

may evidence against them. And the pretence of Collusion is most frivolous seeing the pursuer may give a very good reason why they do not insist against the saids persons, seeing their end and interest in intenting this pursuit is to have reparation for the damage oppression and wrong already done and to be secured and be free from the apprehension of the like as to the future. And as to the first they could have no interest to pursue the persons forsaids, seeing thir persons are in that condition that they cannot expect a suitable reparation, whereas the pannells, especially the ffather is a person who is *locuples* and most solvent. And as to the said other motive, to be free of apprehension as to the future, they are not concerned to pursue the saids persons on that account, seeing any wrong that was done by them was on account and behalf of the said Charles Robertson, who has made it his work to oppress them, and the saids persons not being now in ffamily with the said Charles nor any ways related to him, they neither do nor have reason to apprehend any prejudice or wrong from the saids persons as long as they are not domesticks to the said Charles.

And as to the forsaid pretence that the deeds were not latent, the same is of no weight, seeing tho the deeds were not latent as to the time, yet they were committed in a place not very populous where there are few inhabitants except the persons themselves concerned, and there are no houses within a quarter of a mile where the said house was pulled down. And tho the saids deeds had been committed *in publico* upon all considerations, yet the said Charles Robertson, principall author, hounder out, contriver, and in whose behalf the said oppression was committed, his accession is occult and latent, to witt, his hounding out and the circumstances lybelled inferring the same which are *difficilis probationis* and cannot be proven or known but by those who were his domesticks for the time and were at the committing of the saids deeds. As to the alledgeances founded on the law of the Majesty, opinion of the Doctors and the practicque of Barclay and the citation out of Hope, it is answered that they do not quadrate nor meet in this case, seeing there can be no law nor opinion of doctors nor practicque adduced in this case now in question,

viz. that where a person used as a witness is neither a relation to the pannel nor concerned as to the point of loss or advantage nor *reus* or *damnatus criminis capitalis* or such a crime as *defamat*, that such a person upon pretence that he did concurr with the deeds in question, cannot be witnes. And it is evident by the whole Titles both of *Dig.* and *Cod. de testibus* that where mention is made of *Socij criminis*, that they cannot be witnesses, it is always upon that ground and accompt that they are *rei* of such crimes as makes them infamous, and which if they were made out against them he has not *integram existimationem ac statum*, and that being guilty of such crimes they forfault the capacitie and confidence of integrity that the law reposes on all persons that are not infamous. And seeing it is acknowledged that the persons in question tho they were confessed to be *Socii* or by sentence found guilty of the deeds lybelled or yet *homines legales* such as may be witnesses in all other cases, they are in that same capacity in this case, except it be shown that the law has taken the same from them. And it needs not be represented, being most obvious what great inconveniences should follow both in Spulzies, Ryotts and keeping of Conventicles and other such cases where there can be no probation but by persons that were present, and where the import of the Process being so inconsiderable be an extraordinary mulct and pain *et citra infamiam, citra jacturam, bonorum* yet there should be impunity upon pretence that persons adduced as witnesses can prove because they were present at committing of the saids deeds. And as to that argument that *Socius Criminis* should not be a witness *in atrocibus* there being *eadem ratio in levioribus* and crimes that are not capitall, there ought to be *eadem jus*, the said argument is most weak, seeing it is evident there is not *eadem ratio* in capitall and such other crimes importing infamy, in respect *eo ipso* that a party committs a crime importing infamy if he should witness against another by his own confession, he should be infamous and so is not in a capacity to witness. Which reason does not hold in other crimes that are not *scelera* as the crimes lybelled and are Ryotts and Spuillies and such others when there pursuits and Processes upon the same before the Councill and Justices are indyted *ad vindictam et pœnam extraordinariam*, tho in

some sense the said Process may be called Criminall, being pursued *ad vindictam aut pœnam*, yet properly the saids deeds are not crimes and *scelera* but *delicta*, and as to the Text of the Majesty and other citations forsaids, it is answered, that it is confessed by the Pannells Procurators that the saids instances are only in the case of capitall and infamous crimes, as that of Barclay being falsehood, and that instance out of Hope is in the case of Treason. In which cases as said is, it is not denied that *Socii criminis* can be witnesses on no other accompt but by giving testimony in cases where they are *Socii*, they are by their own confession infamous, as appears by Clarus par. fin. q. 21. No. 11. *in hæc verba, dictum socii criminis, ad hoc ut fidem faciat, requiritur ut sit confirmatum in tormentis, cum enim ex proprio delicto effectus sit infamis, non debet admitti in testem sine tortura.* And as to the said Text in the Majesty, it is to be understood in the case of *criminis proprii dicti* being *scelus*, and a crime importing infamy for the reasons forsaid, which is clear by another place and Text of the Majesty, viz. Stat. Williel. *de his qui notantur infamia*, by which it is evident that all persons that are guilty of deeds that may be called crimes in some kind, which are not *scelesta facinorosa* are not incapable of testimony. The words of that law being that *fures, sacrilegi, homicidæ* and other *irretiti capitalibus criminibus repellantur a Testimonio.*

The Justices finds the objections proponed for the Pannells against the Witnesses relevant.

The two Witnesses, viz. Alex[r] M[c]intosh and James White being examined, they depone and acknowledge that they were present at the down casting of the House and helped to cast down the same, and were actors thereat. Upon which the Assize all in one Voice fand the Lybell not proven and therefore assoillied both the father, and sons, and justly, ffor the Witnesses having acknowledged the objection that was made against them, viz. that they were actors, they neither were nor could be further examined, because by the Interloquiter the objection was sustained.

Observations upon the abovementioned Debate.

Edinb^r 5 June 1671. The five Commissioners present and the Lord Halkerton chosen Preses.

Janet Grier against William Menzies for the Slaughter of John Cuninghame in Smeiton, her husband, the Lo. Commissioners continues the Diet untill that day 8 days and ordains the list of the Assisers and witnesses to be given in to the Pannell, this day or tomorrow.

Edinb. 12 June 1671. The same Commissioners and Preses.

M^c^alaster agt. the Lord Rae [1] and others for Theft, declared fugitives.

Eod. Die.

Archibald Shaw of Kilmore indited at the instance of David Bell for troubling the Kirk in time of Divine Service on the Lord's Day by coming in the dark where the said Janet was sitting, and beating and wounding her with a Batton to the effusion of her blood, and raising a ffray and uproar in the church.

Mr. David ffalconer for the pursuer declares he insists against the Pannel for the Crimes in the Dittay and Assythment of the Partie.

It was answered by Mr. John Elleis that there could be no Process against the Pannell in respect he was conveened before the Lords Commissioners at their Circuit in Air and was convict and sentenced for the said Crime, as appears by the Act of Conviction produced.

It was replyed for the Pursuer that there ought yet to be Process for the Assythment, because the Act of Conviction produced bears no modification for the same.

It was duplied for the Pannell that there can be no Assythment modified beside the Sentence of the Commissioners.

The Baillies of Cumnock having fined the Pannell in £50, and being twice fined, he cannot be again punished either by ffine or assythment.

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[1] John, second lord.

The Lords Commissioners of Justiciary having considered the Indytement with their own Decreet of Conviction and Decreet of the Baillie for the unlaw, ffinds no Process at the King's instance, but reserves to the Pursuer to insist for assythment before the Judge competent as accords of the Law, and Ordains the Pannell to have an Act discharging his Bond given by him for his appearance to underlye the Law at Edinb^{r} for the said crime.

Eod. Die.

Gilbert M^{c}artney against the Stewart of Kirkcudbright and his procurator ffiscall for Deforcement, advocate and deserted.

Patrick Wilson, Gardiner in Glasgow, declared ffugitive for the slaughter of Janet Wright.

Archibald Campbell of Glassens and others for blooding and wounding, declared fugitives.

John Haliburton in Newburgh, Jean Gilmour his spouse, and James Thomson in Achtermuchtie, declared fugitives for Usury.

James Kerr in Keppuch agt. Sir Dougal Stewart of the Kirktown and Mr. William Nimmo his Deput Baillie of the Regalitie of Glasgow, for Theft, advocate and deserted.

His Majesty's Advocate against Purdie, for Usury, deserted.

Edinb^{r} 19 June 1671.

His Majesty's Advocate agt. Cairns for Usury, deserted.

His Majesty's Advocate agt. James Liddell, elder, of Phinnickhaugh, and his sons, for Theft, continued. These two Actions were bound over from the Circuit.

Eod. Die.

A great many of Adulterers.

Intran John Hutcheson, Merch^{t} in Kelso, George Hall in Bricks, Thomas ffindlay in Haugh, Richard Thomson in Spittle, James Waugh in Morven's Law in Scolden Parish. All which persons being found guilty at an Assize of the Circuit Court in Jedburgh in May last for the crime of Adultery committed by each of them, they were ordained to find caution for their appearance before the Lords Commis-

sioners of Justiciary the said day and place to receive Doom and Sentence for the foresaid crimes, conform and according whereunto compeared the forenamed persons and produced each of them an Act whereby they being conveened before the Commissioners for administration of Justice in Criminall Causes in the time of the Englishes for these suspected crimes of Adultery abovewritten, were fined and ammerciate, and each of them made payment of the same, as at length is contained in the forsaid Acts. The which being considered by the Lords Commissioners of Justiciary, they allowed and admitted the same and ordained the Bands given for the fore named persons their appearance to be given up to them, and discharges Andrew Oliver his cautionry for James Waugh.

Observation. The Sentence of the English Judges was less than what the law prescrives, yet the Commissioners of Justiciary behoaved to sustain it because by the 12 Act of the Parl. anno 1661 the judiciall proceedings in the time of the late usurpers are ratified. Vide 10 July 1671.[1]

Eodem Die.

John Grierson in Charlaw and Marion Ludley, spouse to John Oliphant, and John Watson of Spangate, Sir Thomas Kerr of ffairnilie, all conveened for Adultery in severall Lybells and continued. This Marion Laidley was found guilty at the Circuit of Jedburgh, and the Book bears that the pronouncing of her Sentence was continued to this Diet at Edinburgh by reason of her povertie, till the Judges should advise further. The same day also W^m^ Gardner in Burnfoot also found guilty of Adultery with Helen Glendinning at the Circuit, is ordained to go to Prison and his Bond of Cautionry to be given up.

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[1] The English Commonwealth in 1652 appointed four English Commissioners for the administration of criminal justice in Scotland, to whom were subsequently added Sir John Hope of Craighall and Alexander Pearson of Southhall as Scottish judges, Sir John Hope being chosen President of the Court. In August 1654 this appointment was superseded and a new Commission granted in favour of Alexander Pearson as Preses, and seven English judges to sit with him.—W.

Eod. Die.

Thomas Laidley in Haugh, found guilty in the said Circuit for Adultery with Marion Laidley, being called to appear to receive his Sentence, there is a testificate and Depositions of Witnesses produced to prove that he died since the Verdict. Whereupon his Cautioner is assoillied and his Band ordained to be given up, as also Robert M^c^culloch of Kirkhilloch indyted for Incest, continued, and Richard Thomson in Spittle, in Cavers parish, is unlawed for not presenting Janet Huntly, spouse to Andrew Mitchell in Denholme, who was found guilty of Adultery by a Verdict in May last, to receive her Sentence, as he who became bound as Cautioner for that effect, and the said Janet Huntly is declared fugitive.

His Majesty's Advocate and the ffactors of the Earl of Glencairn against Robert Isack in Kirkaldy, for Usury, first pursued in the Circuit of St. Johnston and continued to this day and place and now deserted.

Edinbr. 26 June 1671.

All the Commissioners present. Alex^r^ Brodie of Letham and John Mureson, messenger, against Hary Gordon in Bracco, and divers others for deforcing the said messenger upon Letters raised at the instance of Alexander Brodie of Letham, in the execution of a poinding in January 1671 or in execution of a Caption. Letham ag. H. Gordon. for Deforcement.

Mr. Andrew Birnie for the Pannell Alledges that the Lybell is not relevant because the ground of the Caption being a ffeu dutie payable out of certain lands to Brodie of Letham, the lands are not condescended on in the Lybell. 2° The Lybell does neither condescend on day, month nor year whereon the deforcement was committed, and albeit the law has allowed a latitude as to days *in criminibus absconditis*, yet not in legall executions which are certain.

Replys my Lord Advocate, there is no necessity to lybell the ground of the caption, but its sufficient for to say, that there being a Caption at the pursuer's instance and a Messenger being about to execute it, a Rebell did deforce him, and to the 2^d^ member of the Answer it is not relevant,

ffor albeit it be ordinary to lybell the day, month and place of Crimes, yet it is not necessary in the Crime of Deforcement, because the execution of deforcement which is produced and is *pars libelli* bears it.

Duplys Birnie that a Condescendance in the Execution is not sufficient, but the same must be insert in the Lybell *ab initio* in respect that by the Article of the Regulations it is appointed that the Defender have a just double of the Libell, which cannot be said to be done when there is an addition made to the Lybell afterwards.

The Lords Commissioners of Justitiary sustains the Answer and Duply and deserts the Diet.

In the same Action W^m^ Brodie, Cautioner for Letham is unlawed for not insisting against Hary Gordon, and severall of the Defenders not compearing, are delared fugitives.

Edinb^r^ 3 July 1671.

Robert Bonner indyted of Adultery and committed to prison for want of caution.

Mary Sommerveil and Andrew Laidly both dilated of Witchcraft, sett at liberty upon their Petitions in regard none compeared to inform against them, that they enact themselves when called.

His Majestie's Advocate against James, Thomas and Robert Johnstons, sons to the deceast Robert Johnston of Thershagg, and John Johnston, son to the said James, for Theft, declared fugitives and their Cautioners unlawed.

Sir Thomas Ker of ffarnilie declared fugitive for Adultery, and his Cautioner unlawed.

John Grierson in Charlaw for Adultery continued.

The said day the Diet at the instance of Andrew Mowat against Patrick Dunbar of Blairy, for beating and wounding, deserted.

As also John Hay of Lochlain is unlawed for not reporting Criminall Letters raised at the instance of the said Patrick Dunbar agt. Patrick Tullich, brother to Alexander Tullich of Tannachie, and the said Patrick and the remanent Defenders are declared fugitives, and Thomas Dunbar of Easterbinn and George Grant of Kirkdells, who were Cautioners for their compearance, are unlawed.

Edinbr. 10 July 1671.

George Guislet imprisoned for Witchcraft at the last Circuit at Jedburgh is sett at liberty because none compears to insist.

Eod. Die.

ffalse weights and measures.

Andrew Cochran, merchant in Air, indyted at the last Court in Air for having false or light weights and false or short measures, and witnesses being examined thereupon, the Assize by their Verdict fand it proven that the said Andrew Cochran his Stone and Quarter Weight were light and the Measure short, but found the quantity not proven, viz. how much Weight and Measure was wanting.

Verdict not clear,

After reading of which Verdict in the said Court at Air, the Commissionaries of Justiciary in that Circuit fand the Verdict not clear and therefore continued the pronouncing of Doom untill this Diet at Edinbr. where all the Commissioners being present and having perused the Indytement, Depositions of Witnesses, and Verdict forsaid, they fand the Verdict unclear and disconform to the Dittay, and therefore assoillied the Pannell and declared his Cautioners who were bound at Air for his appearance at this Diet, to be free.

and disconform to the Dittay and therefore the Pannell is assoillied.

Nota, if the Commissioners of the Circuit had caused the Assize inclose there to certifie the impertinency of the Verdict, they had done right, but it could not be done *ex intervallo*.

Eodem Die.

17 Adulterers.

Callum M^{c}oul M^{c}farlane in Luss parish, John Barham, David Leslie in Cuthbert M^{c}green in Greman, John Guidlet of Abbotshall, John Craig in Cuilt, W^{m} Watson, servitor to the Laird of Hisleside, all and each of them being found guilty of the crime of Adultery at the Circuit in Air, and being bound over to receive their Sentence at this Diet in Edinburgh, they produced Acts of fining by the English Judges and Discharges conform, and craved that they might be no farther punished.

The Lords Commissioners continues pronouncing of Sentence till the first Monday of ffebruary 1672.

And Janet Mungle and Margaret Aitkin entering, the Pannell being in the same condition, the pronouncing of Sentence is continued against them till the 13 of November next, as also the following persons, viz. James Sherrit at the Kirk of Cardross, Thomas Miller in Castle Semple, Andrew M^cRebrie in Inch parish, John Smith in Underhill, Jas. Cleland in , Walter King in Baldernock, being also found guilty of Adultery at the Circuit and entring the Pannell to the effect above-mentioned, they are continued to the 24 of July instant, and Mathew ffiends in Kirktown and George M^ckenzie, being also found guilty at the said Circuit and bound over to receive Sentence at this Diet, they are also declared fugitives and their Cautioners unlawed.

Nota, on the 19 of June last the Lords Commissioners sustained an Act of ffining of the English Judges.

Edinbr. 17 July 1671 and 24th.

John Griersone of Charlaw for Adultery continues the Doom.

William Lovell of Cunachie and Arch^d Affleck, younger of Balmanno, indyted for the slaughter of W^m Bell, Sherriff Officer of Perth, continued till 6 of November next.

Mr. James Scott in Coldinghame and Geo: Redpath there, indyted for oppression, the Diet deserted.

Braith and M^cGibbon for Slaughter continued to the 24 instant and frae that to the 22d November.

Robert Brown in Dunfermline for Adultery remitted.

The said 24th day, John Scott, workman in Leith, dilated of Witchcraft, and prisoner sett at liberty, he finding Cautioner to appear when called.

Lauchlane M^cintosh of Torcastle against a number of gentlemen of the name of ffraser and many Highlanders for shooting of Deer, declared fugitives.

Eod. Die.

The said Lauchlane M^cintosh of Torcastle and his Majesty's Advocate against Arch^d M^cdonald in Capoch, and severall

others of the name of M^{c}donald, conveened for the Slaughter of Arch^{d} M^{c}donald in Capoch and Ronald M^{c}donald his brother, and declared fugitives.

Eod. Die.

John Smith in Riccarton, convict of Adultery, declared fugitive for not compearing to renew his Sentence, and his Cautioner unlawed.

The like done with James Cleland in Symingtoun, and Andrew M^{c}rebrie also convict.

Walter King for Adultery continued and James Sherrat in Cardross, guilty of the same crime, remmitted. The said Walter his Remmission is also produced at the next Dyet.

Edinbr. ult. July 1671.

Earl of Glencairn and his ffactors against Robert Smith in Smiddieburn, indyted and accused for Usury, the pursuer for probation produces a Discharge granted by the Pannell to William Seton of Minnies on the 16 ffeb. 1662, which Discharge, being publickly read, the Pannell denyed the subscription and offered to improve it. Usury.

The Lo: Commissioners in respect of the Pannell's offer to improve the Discharge, they continued the Triall to the first Monday of January 1672, and they ordain the Pannell to consign £50 Scotts in the hands of Mr. Alexander Hamilton, Clerk of the Court, which he accordingly consigns, and Andrew Grierson, one of the Earl's ffactors, subscrives the Discharge and abides be and the Pannell finds new Caution for his Compearance at the first Diet.

James Reid in Cassieside in the Parochine of Dumblane, declared fugitive for the slaughter of Ro^{t} Hendersone in Mosshill.

Eodom Die.

James Pedzean in Closeburn Paroch, John Sharpraw there, John M^{c}kendrick M^{c}indrim, and Thomas Wilson in Dalphibble, all within the Sherriffdome of Nithisdale, Pat. Clerk 8 persons Adultery.

in ffel, Roger Gordon in Gorton, and Margaret Maitland in Kirkpatrick, within the Stewartry of Kircudbright, being this day called to have compeared to receive Sentence for their rēxive[1] crimes of Adultery, for which they were convict at the Circuit of Dumfries, as they who became bound each of them under the pain of 100 merks for their appearance, are fyned and declared fugitives. As also Thomas M^{c}mall, smith in Siddick and Robert M^{c}wheir in Grange, being also convict of the same crime at the said Circuit and not compearing to receive their Dooms, they are declared fugitives and their Cautioners unlawed.

John Gilchrist in Porterstoun and John Nicolson in Quarrelwood, indyted of the same crime, continued. As also John Grierson in Charlaw for the same Crime again continued and the absent Assizers unlawed.

Protestation Burnett agt. Minnes.

Att the end of this Diet there is an Instrument booked dated the 7th of August 1671 taken at the instance of Thomas Burnett in Pittenkerrie and John Gordon in Old Aberdeen against George Seton of Minnes, bearing that in regard they were cited to compear this day at the instance of the said George Seton for the Theft of a Horse, that therefore they might be no furder troubled for the crime.

The like Protestation Campbell and others agt. Campbell for a Slaughter.

Edinbr. 6 Nov^{r} 1671.

James Wilson of Spangoll, continued for Adultery.

John Graham in for Mutilation of Robert Glassell, declared fugitive for his Cautioner unlawed.

William Lovell of Cunochie and Arch^{d} Auchinleck, younger of Balmanno, indyted for the Slaughter of W^{m} Bell, continued for the 2^{d} time at the desire of the Pannells, in regard a necessary witness in the exculpation is absent, and that it appears by Depositions formerly taken in the exculpation that the exculpation is not calumnious.

As also the Lords continues the Action at the instance of the said W^{m} Lovell against the said Luis Monteith.

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[1] 'respective' in Adv. MS.

Edinbr. 13 November 1671.

Robert Gardiner against Mr. Arch^{d} Beith, minister, and Donald M^{c}Gibbon, prisoners, for the Slaughter of the pursuer's brother, again continued till the 12th of ffeb. next in respect the pursuer's witnesses are not present.

James Grant for the Slaughter of John M^{c}Gillanders, continued to the 3d of the next Circuit at Inverness, and the absent witness unlawed.

Brodie of Lethen agt. Hary Gordon of Bracco for Deforcement, continued, and Pat. Gordon, his brother, and severall others of the Defenders declared fugitives and the absent witnesses unlawed.

James Liddell of Phinnickhaugh and his sons, for Theft, again continued.

Robert M^{c}Culloch in Kirkclath for Incest continued.

Janet Mungall for Adultery, continued.

Mungo Irvine in Dunbarton for Adultery, declared fugitive for not compearing to receive his Sentence, and Margaret Aitkin for Adultery, declared fugitive for her not compearing to receive her Sentence.

Edinbr. 20 November 1671.

This day Sir James Lockhart of Lee, Kt. Bart.,[1] and one of the Senators of the Colledge of Justice, is admitted Just. Clk. in place of the Lord Renton deceast, and his Commission is here recorded, dated 28 July 1671, and bears to be granted for the great services done by him to the King and his ffather. Sir Jas. Lockhart of Lee adm. Justice Clerk.

Eliz^{h} Leitch, relict of umq^{ll} Alex^{r} M^{c}intosh in Cowll, and Isobal Urquhart, relict of umq^{ll} John Joyner, agt. Thomas Kinnaird younger of Cowbin, for the Slaughter of their Husbands, being first called at Edinburgh, and then continued to the Circuit at Elgin, and being denounced upon mistake, he suspends, relaxes and compears at Edinbr. and the Dyet is deserted.

Advocatus agt. Johnstons of Earshagg and others for Theft, continued.

[1] There is no evidence that Lockhart was a baronet.

fforbes agt. Leith for Slaughter.

Forbes, brother to Alex[r] fforbes of Glencuy and his Relict against John Leith in Cairncroce and the tenants of the Laird of Whitehaugh, for Slaughter of the said Alexander fforbes, deserted and ordained to be delete out of the Circuit Rolls and that upon a Petition given in be the said John Leith for himself and in name of the rest of the Defenders to the Lo: commissioners of Justiciary, bearing that they being formerly conveened for the same Crime, they raised Letters of Exculpation and adduced severall Witnesses and proved Self Defence, and that the Defenders acted by virtue of the late Act of Parliament *anno* 1661 anent pursuing of Thieves and Robbers, and the Witnesses Testimonies were so clear that the Pursuers consented to the deserting of the Diet, and Warrand was given by the Justices that no new Letters should be direct without a speciall Warrand. Notwithstanding whereof they were conveened at the Circuit Court of Aberdeen and indited there without any such speciall Warrand, which was done of purpose to protract and delay and still to keep them in trouble, and the Petitioners being unwilling to lye any longer under the imputation of a false crime or to sustain any more trouble, they have raised Letters against the Pursuers to compear before the Commissioners this day, to hear and see a Diet affixed with Certification to insist in the said pursuit and to liberate the Petitioner's Cautioner of his Cautionry found be him at the said Circuit Court, and that they be no furder troubled by him therein in any time coming, and to discharge their Clerk of taking up Dittay thereanent against them at the saids Courts thereafter, and to discharge the giving out of new Letters against the Petitioners without a speciall Warrand, and that they find Caution to satisfie the Petitioners' expenses. Which Petition being considered by the Commissioners of Justiciary, they discharged any Trial of the Petitioners at Circuit Courts, and ordained the same to be delete out of the Circuit Rolls and the Bands of Cautionrie for Pursuer and Defender to be given up, and adhered to their former Act of deserting the Diet.[1]

I have insisted the longer upon this to shew the form to be used in such cases.

[1] 'and adhered to their former Act of deserting the Diet' not in Adv. MS.

John Gordon of Criech and Alex[r] Vanse, baxter in Edinburgh, unlawed for not reporting Criminall Letters.

Edinbr. 27 November 1671.

The which day Sir Thomas Wallace of Craigie,[1] one of the Senators of the Colledge of Justice, is admitted a Commissioner of Justiciary by virtue of a Letter from the King in place of the Lord Halkerton deceast, which Letter is here recorded. Sir Tho[s] Wallace admitted Lo: of Justiciary.

The Lords having taken to their consideration that the inhabitants within the Burgh are exceedingly troubled by being frequently cited to pass upon Assizers and that through the importunity of Parties and neglect of the Macers to the Court there are some few persons that are always troubled and others go free. Therefore they recomend to the Lords Newbyth and Castlehill, two of their number, to call for the Magistrates of Edinbr. and cause a Liet of all persons fitt for Assizes within the said Burgh to be given up to the effect all the inhabitants may be all equally burdened. Act anent Assisers within the town of Edinbr.

Edinbr. 4 December 1671.

Cuninghame Lady Rattar agt. Sinclair of May and his sons and their associates for Deforcement, declared fugitives.

Edinbr. 11 December 1671.

Margaret Moreis, relict of W[m] Bell, Sherriff Officer of Perth, against William Lovell of Cunochie and Archibald Auchinleck, younger of Balmanno, for Slaughter of the said W[m] and an Action at the instance of the said Lovell agt. Lues Monteith for Oppression, both deserted.

Edinbr. 18 December 1671.

Mr. Thomas Rig, Writer in Edinburgh, against Walter Johnston and other 8 Defenders for Deforcement, deserted upon their Compearance, and a great number of other Defenders declared fugitives.

[1] Readmitted advocate 1661; baronet 1669; Lord of Session 1671; died 1680.

John Pierie in Northballow against Pat Ogilvy in Abernett and others for Hamesucken declared fugitives.

Eodem Die.

John Gilchrist in Porterfield for Adultery, continued, and John Nicolson in Quarreltown for the same crime declared fugitive.

Edinbr. 22d December 1671. The five Commissioners present and Colington chosen Preses.

Advocate agt. Mr. Gab. Maxwell, minister, for High Treason.

Mr. Gabriel Maxwell,[1] sometime Minister at Dundonald, indyted and accused at the instance of Sir Jo. Nisbett, his Majesties Advocate, upon a Lybell of High treason for rising in arms and joining with the Rebells which rose in the western Shires against the King *anno* 1666. This Lybell is word for word conform to that which is raised against the Lairds of Caldwell, Kersland, Bedland, and the other gentlemen in the west, recorded the 16 of August 1667. In which Lybell the said Mr. Gabriel is also insert but not forfeited with these persons. Therefore I need not resume the Lybell here, it being but a coppie of that, with this only difference that there is no Defenders here but Mr. Gabriel alone.[2]

Compeared Sir Jo. Nisbett and produced the Criminall Letters duely execute and indorsed against the said Mr. Gabriel, and the Defender being ofttimes called and not compearing, the King's Advocate desires the Lords Commissioners of Justiciary to proceed to a legall Tryall and Process of fforfaulture against the Defender, conform to the late Act of Parliament, and declared he insisted against him for the treasonable crimes specified in his Dittay, and specially those in the last part thereof in rising and joining with Caldwell in Arms and Rebellion in order to their joining with the Rebells then in Arms, and others circumstances rehearsed in that part of the Indytement.

The Lords Commissioners of Justiciary finds the Indytement

[1] Ordained 1642.

[2] Wodrow says he cannot understand the delay in this case.

relevant and ordains the same to pass to the knowledge of an Assize.

Nota. He was conveened in the former Lybell with Caldwell and was declared fugitive, but the Advocate did not then insist to have him forfaulted.

ASSIZA.

Thomas Calderwood, late Baillie of Edinbr.	William Hoom, elder.
Walter Burne, merchant there.	John Dunbar, glover.
James Stewart, druggist.	Gideon Shaw, stationer.
William Stewart, druggist.	Alex^{r} Reid, goldsmith.
John Adam, merchant in Edinburgh.	Geo : Blair, merchant.

James Glen, stationer.
John Rutherfoord, vintner.
Patrick Steill, vinter.
George Reid, late baillie.
John Craig, wright.

The Assize lawfully sworn no objection to the contrary.

His Majesty's Advocate for probation adduces the Witnesses underwritten, viz. James Cochran in Brekmadie, who repeats and adheres to his former Deposition taken against Caldwell and the rest dated the 15 of August 1667, and proves clearly the rising of Caldwell and these forfaulted with him, and that they marched and Mr. Gabriel Maxwell on their head, and this Deposition is renewed again and subscribed be Colington Preses. James Stevenson in Rainsie proves the same. John Wilson in Rainsie 3^{d} Witness proves all the same except that he is not clear anent Mr. Gabriel riding on their head, and severalls of them prove his threatning of them that offered to go away. And two of the Witnesses, viz. John Stevenson and John Stewart, last witness, proves the taking of Eglinton's servant, with Letters, by that company in which Mr. Gabriel was. Proof. Advoc. agt. Mr. Gab. Maxwell minister, for rising in arms.

But the Verdict of the Assize pronounced by the mouth of George Reid their Chancellor agreeing all in one voice ffinds the Pannell Mr. Gabriel only guilty as being in Arms with

Caldwell and the other persons who were in arms with him in manner lybelled but speak nothing of the taking of Eglintown's man.

The Sentence is conform to that Sentence against Caldwell and his Associates, that is to execute him to the Death and demain him as a Traytor when he shall be apprehended at such times and places and in such manner as the Commissioners of Justiciary shall appoint, and forfaults all his Lands and moveables.

Eodem Die.

Robert Duglass of Achintuill declared fugitive for the Slaughter of W^m^ Lindsay son to W^m^ Lindsay at the fferry of Bonneill, and for wounding and mutilating of Adam M^c^capan in the year 1664, and his Cautioner unlawed.

Edinburgh 1st January 1672.

William ffisher, writer in Edinbr. as Cautioner for the Earl of Glencairn, is ammerciate for not reporting the Criminall Letters raised at the said Earl and his ffactors instance against Robert Smith in Sandyburn for Usury, and the said Robert Smith declared fugitive and his Cautioner unlawed.

James Pilmuir, Baillie Depute of the Regality of Cowpar against George Lumsden, taylor in Perth for Demembration, deserted.

John Whitefoord of Blairwhan against Andrew Kennedy in Lamachty for Hamesucken, deserted, and Caution of Law burrows found.

Edinbr. 8 and 10 January 1672.

His Majesties Advocate against Johnston of Earshagg and his sons and others for Theft of Sheep, first continued and then deserted.

Edinbr. 22 January 1672.

Advoc. agt. Skeen of Halyards for Usury

The Earl of Glencairn and his ffactors agt. Skeen of Halyards indyted of Usury committed by him in so far as having lent 10,000 merks to Sir Da. Achmuty before Mart^s^ 1661. He at that time pactioned and for the Cropts underwritten,

exacted and received more than the ordinary @rent yearly viz. 184£ in money, 24 Bolls beer and 30 Bolls meall, to be uplifted out of his lands of Northside Achmutie and Mill Lands thereof, the Victuall to be paid betwixt Yule and Candlemass and the money at Martᵉ. And Sir David is personally bound to pay the same free of all assessments, publick burdens, and other impositions and 10£ for every undelivered Boll of the said Beer and Meall, and the said yearly Duty was paid for the Cropts 1662 and 1663.

The Dittay is founded on Act 222 par. 14, and Act 247 par. 15 Jam. 6. The Pursuers produced a double of the Contract lybelled on, subscribed by the Messenger executor of the Criminal Letters, which being read, the pannel acknowledged the same to be a just double, whereupon the pannel took Instruments.

The question in this long debate is whether or not be Usury to take a Boll of victuall for the @rent of each 100 merks where 10 lb is made the penalty for each undelivered Boll, decided negative.

It is alledged for the Pannel by Mr. David Thoirs, that the Dittay is not relevant to inferr the pains of Usury, and there is nothing exacted but the just @rent for the principall sum, being 10,000 merks the 184£ of @rent payed in money satisfies only the @rent of 4600 merks. And the 54 bolls of meal and bear is but a boll for the @rent of each 100 merks of what remains, whereas the pannel might have taken more victuall if he had pleased, ffor the act of parliament upon which this part of the Lybell is founded, viz. Act 222 par. 14 Ja. 6. allowed five bolls to be taken for the @rent of each 100£ when it was at 10 pr. cent. And now when it is reduced to 6 pr. cent there will be more then a Boll due, for the @rent of 100 merks by the same proportion. 2° As to the clause of the contract lybelled whereby the pannel is to be freed of all Cesses and publick burdens, nothing can be inferred upon it because he had still the hazard of downfalling of prices and bankrupt merchants and the hazards which might have fallen upon the victuall after delivery, which depended *ex futuro et inopinato eventu*. 3° As to that part of the Dittay which bears that 10£ was pactioned for every undelivered Boll, that cannot inferr the crime of Usury because that is not as price but *nomine pœnæ et propter moram* which was purgeable or preveenable by delivery of the Victuall and *de facto* the victuall was always payed and never the penalty. And if a

paction such as this for a faillie were sufficient to inferr Usury, all rights of @rent containing termly faillies in case of not payment of the @rent should be usurious, which were absurd. And nothing is more lawfull in case of faillie then to exact both the @rent and the penalty.

Replys Mr. John Eleis that the Dittay is opponed founded both upon the Common Law and the forsaid Act of parl. ffor by the Common Law where any person exacts or makes paction for @rent *ultra modum a jure concessum* he committs usury. And it does not import whither the law be contraveened *in terminis* or *in voluntate et intentione legis* by taking *usuras simulatas* as is done in this case where the pannel did take a boll of bear or meal for the @rent of 100 merks, which is worth more by the common estimation of the countrey, being free of publick burdens. 2° As the pannel by his exaction had actuallie more then his @rent, so he truly intended it when he bargained, as appears by the circumstances following, ffirst that he exacts a part of his @rent in victuall without leaving it in the option of the Debitor to pay money or victuall at his pleasure, which could be upon no other design but to gain by the victual. 2° The inserting 10£ of faillie was done to take advantage. And as to the pretence of hazard by the falling of prices of victuall, the same is of no moment ffor 1° This dammage is compensed on the Debitor's side in so far as by the loan of the money the Debitor did sustain the hazard of the money which was as great a dammage. 2° There could be no hazard by the falling of prices, because by the Contract produced it appears that the Pannel had power at any Whitsunday or Martimas he should please to call for his money, so that it was in his power to consider before hand the rates of a subsequent year, and to call for his money or not as the prices should rule, whereas the Debitor has no power of Reversion. And as to that pretence that the 10 lb adjected for each undelivered Boll is a penalty and not price, the same ought to be repelled in respect of the Common Law which presumes all exorbitant penalties of that kind to be in defraud of the Laws of Usury, and is clear by an express text in 16 §§ *de usuris*—(*Cum non frumentum*) *ad hæc qui fructuos aridos credidit agricolæ, vel pecuniam in unoquoque anno pro modo*

octavam partem modii, pro solido siliquam unam usurarum nomine accipiens; terram, sive aliquid aliud, quod pignore accepit omnimodo reddat. Si aliquid præter hoc commiserit, ab actione cadat omnimodo.

And as this case is evident from that text cited, so it is clear from our own law in the forsaid 247 Act par. 15 Ja. 6. whereby it is expresly statute that all @rents of victuall shall be reduced to a conformity of price effeiring to the just @rent in money, which is so[1] to be understood that it shall be so reduced in the right of @rent it self. And that again is so performed when the Debitor has it in his option either to pay the victuall or the @rent in money. And it can be no otherways seeing the Act of parl. prohibites all pactions for more victuall then what is conform to @rent. But in this case there is a paction of victuall simply without any alternative, and to force the payment of this victuall the exorbitant penalty is adjected, which is a clear contravention and a defrauding of the act, and in respect of these circumstances it ought to be judged a clear contravention of the law.

Sir George Lockhart adds to this Reply that both the Common Law and our law has inferred Usury whether the *usura* be *vera* by taking more @rent in money then is allowed by law or *simulata* when under the pretence and colour of other Contracts which were otherwise lawfull. An exorbitant advantage is intended or designed, and which last case of *Usura simulata* is expresly provided for and prohibite by the forsaid 247 Act par. 15 Ja. 6 in the case of Contracts conceived under the name of buying and selling or other bargains, and under the colour of such contracts an Usury bargain is designed. And the Contract now under debate is such a contract *et totidem verbis* it falls within the compass of the Act of parl. ffor by the express words of the Act its declared that contracts bearing obligements to deliver bolls of victuall at a certain day and failing thereof certain liquidate prices, the same are usurary and presumed to be entered into in defraud of the Act of parl. made against Usury. And here its clearly subsumed that this is the case of the Contract produced, yea it is worse in the case of the Act of parl. ffor the 10 lb is not adjected as

[1] 'so' not in Adv. MS.

a simple penalty, but is in effect an *alternative* obligement. And tho it had been insert as a penalty, yet it is exactly in the case and terms of the Act which reprobates all such pactions as usurious, and which indeed is nothing else but *salva prerogativa verborum sententiam legis circumvenit*, and the Act was made upon design to obviate such pactions. Likeas the Contract was not only usurious by the forsaid clause, but it is exorbitant and usurious by the whole tenor of it. And its frivolous to pretend that the pannel could undergo any hazard that could purge the exorbitancies of the Contract, for he was in all events sure and secure both as to hazards and prices and might have called for his money, whereas the Debitor had not power to offer it nor pay @rent in place of the victuall. And as the Contract is usurious in the exaction, so it was in the design because at the time of entering into the Contract the beer was selling for 6£ the boll, and by the computation of the ffiars of the years, it will appear to have been always so since the pannell's possession, and that each boll is allowed to him for £4.

And whereas its pretended that by the 222 Act par. 14 Jam. 6, its there declared lawfull to accept of 5 bolls victuall for each 100 lb when the @rent was at 10 p. cent, and that the victuall contained in this Contract is short of that proportion, its answered that the Act of parl. on which the Dittay is founded, viz. 247 Act par. 15 Jam. 6 is posterior and derogates therefrae, it being thereby provided that all victuall shall be reduced to a just conformity of price, and that all pactions for paying of liquidate prices beyond the worth of the victuall are usurious. And there can be nothing more exorbitant than that the pannel should have victuall allowed to him at 4£, and get 10£ in case of not delivery, which was access *ultra sortem*.

Duplys Sir George M^c^kenzie for the pannel that Usury arises only and properly *ex mutuo* where the profite is liquid and certain, but in other things which came in place of money and were not liquid, usury is only introduced *ex accidenti* and out of meer force lest the law should be cheated, and except that either there were express bargain or paction to circumveen the law, or that *ex natura rei* it did necessarily follow that that believed to be exorbitant advantage the law does not inferr

usury, seeing the value of things may differ either according to the place or time, which may be very clearly seen in victuall whose price alters so much that the Contracter can promise to himself no certain gain, and therefore the forsaid Act 222 par. 14 Jam. 6 has appointed 5 bolls for every 100 lb least the leiges should be uncertain how to contract and might incurr hazard if the number of Bolls were not defined, which Act, as it was very necessary to keep the leiges from snares, so the reason of it continuing unto this day it ought likewise to continue in vigour, nor is it abrogate (as the Reply bears) by the 247 Act of the 15 parl. Jam. 6, expresly or by necessary consequence, ffor the design of that Act is to obviate the making of simulate bargains, by which at the time of making them, more @rent is pactioned for than the law allows, but to palliate the express transaction, wadsetts and Back Tacks are granted, so that except it had been libelled that a greater @rent was expressly pactioned and transacted for, and that this Contract came *in vice* and place of it, or that extraordinary advantage did appear to be taken (which are presumptions *juris et de jure*) and does supply the proving of an express transaction, or at least that advantage were taken beyond the Quota mentioned in the Act of Parliament. The said last Act cited can take no place to infer Usury, especially seeing it appears *ex natura rei* and by the following presumption that no such thing could have been intended, as 1° The Gain was most uncertain, which uncertainty of the Gain does take off the reason inductive of Usurie, which is a certain advantage. 2° The gain could have been but small and unworthy the hazarding of Usury in an open bargain by a Gentleman who needed not take such advantages, and who either knew not what Usury was or knew the hazard of it to be greater then that advantage was worth.

Earl of Glencairn and ffactors agt. Skeen of Halyards for Usury.

3° The fiars of the first year was not made the time of the Contract, and the Debitor might have redeemed and so freed himself in any after years, for he was not debarred.

4° Tho the Pannell had requisition of his money, yet he could not assure himself of it when he had to do therewith, because the Debitor was not very solvent, and there were no Cautioners for requisition.

5° Not only were the ffiars uncertain, but it was known that the quality of the Victuall in that place where the @rent is aue is much worse than the victuall at other parts of ffyfe, where the ffiars are generally made. And as to the penalty, it cannot infer Usury, because it is not an advantage arising from the money but from the Debtors' negligence. And the Debitor can have but small loss thereby even tho he should incurr the penalty, because the Lords of Session are in use to modify and restrict according to the just dammage of Creditors, and Usury being a crime whereof there are but very few instances at the time of this Contract, it would be hard to make a Gentleman liable who engaged either out of kindness or necessity for his friend unless their were a clear design of certain and sure advantage, and the contrary would tend to ensnare the most innocent and to break of all acts of kindness and commerce among friends and neighbours in this time of necessity of money where land is that only which can be given for security, and is seldom or never given but to the Debitor's loss.

Triplys Sir George Lockhart, that he repeats and oppones his former reply and Act of parl. 247 whereupon the same is founded, wherein the words of the Act are clear and positive, and its a clear mistake to think that usurary pactions must necessarily be concomitant or imply a sensible advantage *in omnem eventum* or that its so provided by the Act of parl. ffor if one should paction for more then the ordinar @rent in the case of a casual condition which never existed, it would still be usury suppose *de facto* by the faillie of the condition nothing can be reaped or payed. And besides the Act of parl. founded on this Act is likewise usurious in respect of the 62 Act par. anno 1661 intituled Act betwixt Debitor and Creditor, whereby whenever the Creditors bargain is secure against the hazard of war, suits, and depauperate tenants, such bargains altho permitted before the said Act yet thereafter are declared usurary. And here the Creditor undergoes no hazard of assessments, suits, and depauperate tenants, ffor as to all those he is secure either by delivering of *ipsa corpora* or in case of not delivering by exorbitant and usurary prices to which they are liquidate by the said Contract. And cer-

tainly if this preparative were sustained, the Debitor should be altogether exhausted by pretended @rents of victuall. And there is no positive case that is clearly determined by the forsaid Act of parl. 247, but that wherein the paction of paying of exorbitant prices in case of not delivery of victuall, is reprobate. And therefore the pursuer oppones the Act of parl. founded on and supposes the Lords of Justiciary will be tender *uno ictu* to subvert so necessary and wholesome laws, seeing it appears by the tract of the Act of parl. that the laws of this Kingdom have from time to time resisted all evasions which humane avarice was prone to invent, whereby to take more @rent then was allowed by law, and at last made the forsaid Act of parl. which indeed is conform to Law and Justice and to the Common Law. And without such simulate Usury were reprobate, the Acts of parl. made against Usury could take no effect.

Quadruplyes Mr. David Thoirs, that he oppones the former Answers and Duplys with the Act of parl. 222 par. 14, which stands relevant, ffor as the Act 247 does no ways repell the former Act, but is made against simulate bargains and against such as exact exorbitant faillie but the pannel never exacted a faillie tho it was incurred, as is clear by his Discharges. And as to the Act of parl. anno 1661, the samen does not meet the pannell's case unless it could be made appear that he had taken the Debitor obliged for more then ordinar @rent, and likewise to free him of publick burdens etc. but it cannot be said that a boll of victuall for the @rent of 100 merks is above the ordinary @rent, and the pannel never made profite by it.

The Lords Commissioners of Justiciary repells the Lybell, Answers and Duplys in respect of the Alledgeance, Reply and Triply and ffinds no proces.

Wrong written Interloq^{r} and how it comes to be so.

This Interloq^{r} as it is written is nonsense because it designs the Reply, Answers, and the Duply, Reply etc. and proceeds upon this mistake that the Clerk had written the dispute so intituling the Reply, Answer, the Duply, Reply, and the Triply, Duply. And it will seem strange to any who reads this Interloq^{r} that it should repell both the Lybell which is the pursuer's part, and the Answer and Duply which is the

defender's part, and yet that it should find no Proces against the defender. Therefore the Interloq^{r} must be in these terms following:—

The Interloquitor rectified.

The Lords Commissioners of Justiciary repells the Lybell, Reply and Triply proponed for the pursuer in respect of the Answers, Duply and Quadruply proponed for the pannel, and finds no proces against the pannel.

This is conform to the dispute as I have amended it.

Edinbr. 29 January 1672.

John Johnstone of Oldwalls for the Slaughter of James Armstrong, diet deserted.

John Nicolson in Quarreltoun for Adultery, declared fugitive.

William Wallace in Easter ballon, and Hugh Watt, messenger in Glasgow, unlawed for not reporting Criminal Letters against Brisbane and Bogle.

David Muirhead of Teachatheugh and his son and daughter, prisoners for Theft, ffinds Caution to answer and are sett at liberty.

Edinbr. 5 February 1672.

Callum M^{c}farlane in Luss for Adultery deserted because he instructed that the English Judges fined him in 30£ Scots.

The Diets against William Watson in Heisleside and Cuthbert M^{c}Green, continued to the third day of the next Circuit for Glasgow and Aire.

John Bar in Strathbane and David Leslie in
declared fugitives for Adultery.

John Craig in Cult indited of Adultery and continued.

The said day the Lords Commissioners discharged the clerks for the next Circuits from taking up of any Dittays against any persons for Adultery who were put under Caution to appear at Edinbr. or the Diet deserted as to them.

John Guidlett of Abbotshaugh found guilty of Adultery at the Circuit and who found Caution to appear this day at Edinbr. to receive his Doom, declared fugitive for not compearance and his Cautioner unlawed.

Christian Morison, prisoner in Stirling for alledged Witchcraft sett at liberty upon her finding Caution to the Sherriff of Stirling to compear before the Commissioners of Justiciary at the 3d day of the next Circuit for that shire.

Edinbr. 12 February 1672.

John Watson of Spangolls for Adultery, continued and John Grierson of Chairlaw for the same crime remitted.

Mr. Archibald Beith and ffinlay M^cGibbon, prisoners, indited for slaughter, continued till the 3d of June next, in respect the Witnesses were contumacious, and a Warrand is direct to the Bailie of the Regality of Arran and other Baillies and Sherriffs for apprehending the Witnesses.

Edinbr. 19 February 1672.

The Lord Strathurd preses, Castlehill, Newbyth and Craigie present.

Alexander Brodie of Lethen against John Duff in Old Aberdeen and George Adamson for Theft deserted.

Eod. Die.

Brody agt. Gordon Deforcement, convict.

Alexander Brodie of Lethen against Hary Gordon of Bracco, indited and accused for Deforcement. In so far as albeit by the 84 Act par. 11 Jam. 6 and 150 Act par. 12 Jam. 6, the deforcement of Messengers or officers are severely punishable by escheating their moveables and arbitrary punishment suitable to the crime. Likeas by severall other acts of parl. the blooding, beating and wounding of his Majesties subjects is severely punishable, nevertheless John Muirson, messenger, having on the 16 of Janry. 1671, gone to execute a Caption against the said Hary for few duties due by him to the pursuer, for his lands as a part of the Abbacy of Kinloss, he deforced him,[1] and he and other persons lybelled, beat and wounded the Messenger after he had laid hold upon the said Hary and touched him with his wand of peace several

[1] 'having his Blazon,' marginal note.

times, and he and his accomplices commanded the Messenger's wand of peace and his sword to be broken.

The Debate, the points whereof are if the lybell being for deforcing the Mess^r in execution of a Caption should specifie and bear the grounds of the Cap: and that the Caption was shown and in what time of the day it was execute, all decided negative.

Mr. Andrew Binnie for the Pannell alledges the Inditement not relevant because it does not condescend particularly on the few duties, which are the ground of the Caption, nor out of what land the same is payable, whereby the pannel is prejudged of a Defence which he might propone, viz. that the Debt is either payed or suspended. 2° It is not relevant because it does not condescend the Messenger shew his Caption, and without which it was lawfull to deforce him. 3° The Lybell does not condescend upon the time of the day on which the Caption was execute, as it ought to have done, for the day lybelled being the 16 Janry. if he did offer to execute after sunsett in the darkness when he could not shew his blazon, nor could the pannel see it without shewing, the pannel was in *bona fide* to deforce him, because without these things he could not know him to be a messenger. And the Civil Law in L. 15 ff *de Sententiis* has determined both the time and place of Judges in their Sentences and Messengers in their executions. And our law and constant custom, and especially the Decisions of the Lords of Session has done the like, to witt that no sentence should be pronounced nor Letters execute before or after sunrising. And so it was decided in a Decision recorded by Dury day of 1628.[1]

Replys My Lo: Advocate to the first part of the Defence anent the not condescending on the grounds of the Debt, he oppones his lybell which is as strongly and relevantly lybelled as any lybell of Deforcement uses or ought to be. And the Messenger being authorised by virtue of a Caption to take the pannel, being a Rebell, he ought to have obeyed, unless he had produced a suspension suspending the Warrand. And tho there had been a Discharge as there is not, and that it had been produced, yet that could not have stopped the Execution of a Caption against a Rebell, the Messenger being obliged to execute the same and having no power to consider whether it be a Discharge or not, or whether it be true or false, valid or invalid. And the Defenders only remedy in

[1] *Halkerton* contra *Kadie and Greives*, 1st February 1628. Durie's Reports, 338.

that case was to suspend and relax and obtain charge to put at liberty after he was taken. And to the 2d the Dittay is also opponed bearing that the Messenger was about to execute the Caption, and did attack and touch the Defender with his wand, and there was no necessity to shew the Caption being direct to the Messenger for his Warrand to take the Rebell, and bearing no Warrand in it to shew the same to the Rebell. And this is not like the case of Citations, where a copy ought to be given to the Defender to the effect he may be instructed to answer. And specially there was no necessity to shew the Caption in this case except it could be instructed that the pannel sought sight thereof. And to the 3d member of the Defence anent the not lybelling the time of the day on which the Caption was execute, it is altogether frivolous, it being lawfull and usuall to execute Captions at any time of the night, and much more after sun sett, and that because Rebells may be best surprised and apprehended on the night. And the Citation of the Civil Law does not quadrate with this case, it being only as to the time of sitting of Judges and pronouncing of Sentences, and the practick relates to the case of poynding only and cannot be extended to the case of Captions because of the disparity of reason, ffor in poyndings more persons may be concerned then he against whom the poynding is execute, and may compear and make faith that the goods belong to them, which could not be well done if the poynding were not execute on the day time but in the execution of the Caption the Rebell only is concerned and the Law has sett down no time as to him.

Duplys Sir George Lockhart, that he repeats and oppones the first Defence and the reason thereof why the ground of the Debt ought to be condescended on. 2° It was necessary to shew the Caption because a Messenger cannot lawfully seize upon a person without it, and was but as a private person without the same, and would lay down a foundation for unjustice and violence if it were otherwise. And *hoc ipso* that my Lord Advocate does acknowledge that a Messenger executing a Summonds must shew his Warrand. It does undeniably follow that there is more reason to shew a Caption. And if a Messenger could not charge a Magistrate to concurr to apprehend a Rebell, at

least if the Magistrate were not obliged to give concurrence without production of the Warrand, then upon the same reason a free subject is not obliged to surrender his person as a prisoner till the Messenger shew the Caption, that it may appear that he is *in actu officii*, and cloathed with his Majesties authority, as is done in all other legall executions *in initio actus*. And the crime of deforcement being a crime consisting in the disobeying and opposing of authority, the Messenger should have shown his Caption to instruct that he was cloathed with authority. 3° It is unwarrantable to pretend that Captions for Civil debts may be execute in the night time, and the reason adduced for proving of it is of no moment, because it is not the interest of parties only, which the Law considers in Executions, but the solemnity and order which ought to be in legall executions, as also the Law considers the inconvenience which might follow by night Executions, which would be an inlett to violence and robberies, which would be committed under the pretence of legal Executions. And upon this reason of inconvenience the Lords of Session in the forsaid practick, declared the forsaid poynding, which was execute before sunrising, unlawfull. And there was much reason not to execute this Caption in the night time, it being execute in a broken countrey, where the Defender had reason to suspect the Execution to be some illegal deed, and where all the opposition he made was but to defend himself and make his escape.

Triplys my Lord Advocate, that he oppones his former Replys, which in effect answers all that is in the Duply. And whereas notwithstanding of the Reply, it is still pressed that a Caption ought to be exhibited and shown when it is asked, he resumes the Triply and then answers that it is not understood what is meant by exhibiting of Captions, if it be meant that the same should be exhibited to the Rebell. That were absurd and dangerous, for he might go away with it and leave the Messenger without a Warrand. 2° As to the question whether or not it would not be necessary to shew a Caption to Magistrates before they should be obliged to give their concurrence, it is answered that nothing can be inferred from that in favours of the pannel or any other Rebell, because

of this disparity that Magistrates are charged to assist and do duty, and are not obliged to do it untill the Warrand be shown, which commands them, but a rebell is only to submitt and render himself prisoner, and the order to take him is simply to take and apprehend him, and not to show the order that he may surrender. 3° The inconvenience or argument *ab incommodo* which is pressed from the disorders that may follow upon such practices, is of no weight, for what inconvenience can follow upon a Messenger's doing his duty. And there being a Commission to take him without any distinction of time and place wherever the Messenger can apprehend him, its being all one whither he be caught in the fields or in the house, or in his own house, or in his neighbours.

Interloquitor.

The Lords Commissioners of Justiciary having considered the forsaid Debate, Repells the Alledgeance and Duply in respect of the Reply and Triply, and ffinds the Dittay relevant and ordains the same to be put to the knowledge of an Inquest.

Verdict of the Assise.

The pursuer for probation having adduced his Witnesses, the Assise being all merchants and tradesmen in Edinbr. they by the mouth of James Edmonstone their Chancellour, returns the Verdict in thir terms, that having considered the lybell and depositions of witnesses against Hary Gordon of Bracco, the verdict of the Assise is guilty, except three persons, after which the Lords Commissioners continues the pronouncing of Doom untill the 26 of ffebruary instant and commands back the pannel to prison to remain till the Doom be pronounced.

Craig for Adultery fugitive, his Cautioner unlawed.

Nothing more at this Diet except that John Craig of Cult who was found guilty by an Assise at the Circuit Court of Stirline, is declared fugitive for not entering himself at Edinbr. as he who was bound for that effect, and his Cautioner unlawed.

Edinbr. 26 ffebry 1672. Lord Lee, Justice Clerk, Strathurd, Castlehill and Craigie present.

A debate agt. the Verdict forsaid upon this head that they disclosed before they agreed and returned the Verdict.

Hary Gordon being again entered, the pannel, to receive his Doom upon the forsaid verdict of the Assise.

Sir George Lockhart alledges for the said Hary, that no respect can be had to the Verdict of the Assise, because its

clearly provided by the Act of parl.[1] that if the Assise disclose before they have fully agreed and returned the Verdict, the pannel is thereupon to be assoilied. And its offered to be proven in this case that the Assise did clearly contravene the Act of parl. in so far as two of the members thereof, before the Verdict was fully written or subscribed by the Chancellour and members of the Inquest or sealed, did disclose and came to the Inner house and spake with severall persons there. Likeas the Macer and Andrew Craik did repair to the Inquest and expostulate with them for suffering two of their members to withdraw, and then did turn and force back the two members of the Inquest to the room where the Inquest was inclosed, and after which the Inquest did continue by the space of half an hour or thereby, and the forsaids persons who formerly withdrew, did subscrive the Verdict after their return, and which is clearly contrary to the Act of parl. which is a publick law and introduced upon the consideration of publick good, and which ought not to be dispensed with, and it is known by experience that after members of Inquest have voted their will by great difference and debate anent the wording and drawing of the Verdict, and which neither is nor can be called a Verdict till it be both drawn,[2] subscribed and sealed, and which cannot be alledged in this case, not being so much as fully written. And as to what is alledged, that the Lords of Justiciary are not Judges to the said Defence, but only the Assise themselves, they being warranted by the Act of parl. to assoilie the pannel. It is answered the same is a great mistake, and there is no such thing imported or meaned by the Act of parl. And *quid juris* if the haill Assise before the voting or subscriving of the Verdict, had not withdrawn and disclosed, it were groundless to pretend that they themselves behooved to be Judges[3] whither they had contraveened the Act of parl. or not. But that which is the true meaning of the Act is simply this, that a third party should return to the Assise the time they were sitting inclosed, then the Assise without farder con-

[1] Act 1587, c. 92. A commentary upon this statute will be found in Hume, vol. ii. p. 419.

[2] 'drawn' not in Adv. MS.

[3] 'to judge' in Adv. MS.

sideration of the Dittay is warranted to assoilie, there being in that case nothing that can be imputed to the Assise themselves, whereas in this case the Act whereupon the Contravention is founded, was the withdrawing of two of the members of the Assise. Likeas the power granted to the Assise to assoilie, is not arbitrary to the Assise to do or not to do, but is a necessary act, and the Lords of Justiciary finding the matter of fact relevant and proven, they may ordain the Assise to assoilie, and likewise declare the pannel accused free, especially in this case where the contravention of the Act of Parl. is founded upon the members of the Assise their withdrawing. And therefore the pannel oppones the Act of parl. and there can be no case more favourable and which beside is of general concernment as to the interest and security of the people.

My Lord Advocate answers, that the Defence abovementioned is no ways relevant nor founded upon the Act of parl. because the said Act of parl. as all Laws and Statutes is and ought to be understood *non judaice* but *cum grano*, and according to the Generall Rules and practicks of Law *ut evitetur absurdum*. And be all law and practick there cannot be a transgression of law to the prejudice of his Majesty or other accusers or persons ordained *sine dolo et maleficio propositum distinguat*, and it is evident by the said Act of Parl. that the crime of contravention of the said law thereby meaned, is only when the Accusers or the informers of his Majesties Advocate, or any other person having interest, or in order to, and in behalf of their interest after the Assise is inclosed, presumes to sollicit or speak to the Assise, and gets access to them for that purpose, or any of the Assise, in order to and upon the accompt forsaid, comes out of design and purpose, in which case the parties concerned are the informers of his Majesties Advocate, or any others contraveening the said Act of parl. It is just and reasonable that the accusers should forfault their interest, and his Majesties interest being only upon occasion of their dilations, there is some reason to pretend that his Majesty should forfault any benefit that might arise to him upon the accompt of the Contravention of the Informers. And therefore it is declared by the Act of Parl. that if any of

the Assisers or Informers of his Majesties Advocate, transgress the said Act of Parl. that the party should be free, but that his Majestie should forefault his right and benefit, or the Accuser and Informer should forfault his right and benefit and interest upon the pretence of the Contravention of the said Act of Parl. by themselves or any other person in their behalf, but through the ignorance or inadvertance or fault of any other person, it is most absurd. And this great inconvenience should ensue, that one or two of the Assisers may be practised by the Defenders, and may be induced to come out after the Assise is inclosed, upon purpose that the Defender may upon the practise forsaid have a ground of defence. 2° It is clear in the point of fact that the persons who are alledged to come out after the Assise were inclosed, did come out of purpose and design *et ex dolo malo*, and that they did not come out untill all the Assise had agreed on the matter and had fully given their verdict, and the Chancellour having heard and taken the suffrage and vote of every one of the Assise and marked the same. And that they did not in effect come out, but looked out at the door to see if the Judges were sitting, to the end they might come out and return their verdict, and in order thereto to get the candle and wax for sealing and closing the samen. So that it is evident that the deeds forsaid is neither under the letter nor meaning of the Act of Parl. 3° The Act of Parl. is opponed whereby its clear that the Assise is to judge in the case of the contraveening of the Act of Parl. And specially seeing they are Judges to the point of fact, whether a Defence be proven or not, and consequently they ought to judge whither the Defence forsaid be proven. And by law and by the express words of the Act of parl. they only can assoilie on the said Defence. And as to the instance and query, viz. if the whole Assise did contraveen the Act of Parl. *quid Juris*, the samen needs no other answer but that we are not in that case *et ubi lex nec nos*, etc., and from the present case there is only two that are said to contraveen the said Act, so that the other 13 may judge the case in question.

Interloqr. The Lords Commissioners of Justitiary having considered the forsaid Debate, repells the alledgeance in respect of the

Reply, unless the pannel would alledge in thir terms, viz. that some of the members of Inquest came out before the votes were concluded, and after gathering thereof the Chancellour had verbally intimate the same to the Assise, albeit the verdict was not formally redacted *in scriptis* and subscribed. And the Lords ffinds that they themselves are Judges to the relevancy of the said alledgeance, and the probation ought to be led before them, and thereafter to be remitted to the same Assise, who are to inclose and return their verdict thereanent.

The Lords Commissioners of Justitiary having considered the verdict of the Assise, Decerned and adjudged the said Hary Gordon to have forfaulted, amitted and tint all his moveable goods and gear, and decerned the one half thereof to appertain to his Majesty, and the other half to pertain to the said Alexander Brodie of Lethen, at whose instance the saids Letters were raised, and ordained him to remain in prison till the Justices farder order thereanent. Sentence.

[Blank] Observation.

Eod. Die.

Sir George M^c^kenzie of Tarbatt reports the Criminal Letters against Neil M^c^Leod of Assint and a great many of his friends and followers for Intercommuning with Rebells, declared fugitives. John Wilson of Spango for Adultery, continued. Sir George M^c^kenzie of Tarbatt agt. M^c^Leod and others intercommuning declared fugitives.

James Crookshanks ordained to be put to liberty upon his petition, he giving the Clerk the Criminal Letters raised at his instance.

Edinb. 1 March 1672.

Mug against Cuthbert Baillie of fforfar for wrongous Imprisonment, deserted in respect that a list of the Assisers

and witnesses were not given to the pannel the time of his citation.

Cuming agt. Gordon and others for oppression, fugitives.

Sir Alexander Cumming of Culter against Mr. David Gordon of Achoyneine, Mr. James Spence in , John Ersekine and Robert Steuart, Messengers, and James Gordon of Tarperse for hamesucken and oppression, declared fugitives, and their Cautioners unlawed.

Edinb. 4 June 1672.

Mr. Robert Martin's admission be Justice Clerk Depute.

Sir George M^c^kenzie, advocate, produced a gift and deputation granted by Sir James Lockhart of Lee, Lord Justice Clerk, to Mr. Robert Martin, writer in Edinbr. of the office of Deput Clerkship to the Justice Court, which is here recorded, and whereupon the said Mr. Robert is admitted and received, and his oath *de fideli administratione* taken.

Mr. Archibald Beith and Donald M^c^Gibbon, for Slaughter, continued to the 13 instant and the pannells ordained to have a Diligence for proving their exculpations against the said Diet.

Thomas Mulliken in Cargat for hamesucken and mutilation, continued.

James Liddell of Phinnickhaugh and his sons for Theft, deserted.

Sir Hugh Campbell agt. William Ross, son to Alex^r^ Ross in Leaonoch, Gregor M^c^Gregor and others for Theft, hamsucken and other crimes, declared fugitives. Alexander Duff, writer in Edinbr. amerciat for not reporting Criminal Letters raised at the instance of Alexander Catach in Bredach, and others against Alexander M^c^gregor in Dalbowy and others for Theft.

Edinbr. 10 June 1672.

John Ronald in Stonnyfoord declared fugitive for beating, wounding and mutilating of Rob. Harvey in Tilliechowdie.

Sir Alexander Cumming of Culter agt. Mr. David Gordon of Achoynenie, and others, for oppression declared fugitive, and against Mr. Robert Steuart, messenger, deserted.

Edinbr. 13 and 14 June 1672. Present in the Court Lord Lee, Justice Clerk, Colintoun, Strathurd, Castlehill and Newbyth.[1]

Gardiner agt Beith, slaughter, convict.

Mr. Archibald Beith,[2] late minister of Arran and Donald M^cGibbon his servant, indited and accused at the instance of his Majestie's Advocate and Robert Gardiner, brother to Allan Gardiner, merchant in Irvine, for the slaughter of the said Allan, in so far as the said Mr. Archibald and his servant having dwelt in the isle of Arran, a remote place from any countrey or town, made it their work and imployment to oppress the poor people that came to that place, and upon the 19th of Aprile last, there having come a small bark of five tunn or thereby loaden with household stuff and other goods come from Ireland, and being driven in at the said Isle of Arran in that loch called Lochlash, and having stayed there two or three days, and James Duncan, skipper of the said vessel, and the rest of the company having come ashore for their refreshment and recreation upon the 25th of the said Aprile, he the said Mr. Archibald Beith and Donald M^cGibbon did call the said James Duncan, Andrew Gardiner and Patrick M^cIlhatten, who was in their company, to drink with them, which being consented to by them, the said Mr. Archibald did in a seeming way profess much kindness to them, and the said skipper and his company having parted from them and having gone aboard the vessel, the said Mr. Archibald accompanied with the said Donald M^cGibbon and others, being armed with swords, durks and other invasive weapons, did come to the said vessel and shot three several shots whereby the said Allan Gardiner did immediatly dye, and the said Patrick M^cHilhattin was mortally wounded, which being done by them they immedi-

[1] Burnett in his *Treatise on Criminal Law*, in referring to the case under title 'Homocide,' chapter i., states that it was ably argued by Nisbet and Ellis on the part of the 'Crown, and by Sir George Lockhart and Mackenzie for the pannel.'—W.

[2] He was the 'curate' at Kilbride. In a footnote to Burns's edition of Wodrow, it is stated that after his liberation he applied to the town council of Rothesay for help and liberty to beg. He was granted twenty pounds Scots, but not the privilege sought.

atly retired upon shore and was apprehended. Of the which crime of Murder or Slaughter of the said Allan Gardiner and wounding of the said Patrick McIlhatten, the forenamed persons and ilk ane of them were actors art and part, which being found by an Assise etc.

This lybell is recorded at the first calling which is the 24 July 1671, and being continued from day to day to this Diet, it is but here only touched.

The Debate. Sir George Lockhart for the Pannel Mr. Archibald Beith, alledged that he cannot pass to the knowledge of an Assise for the crimes lybelled, because albeit any slaughter had been committed or that any accession could be qualifyed against the pannel to the same, yet it can import no crime against him in respect the Defunct and others in company with him, having contrair to the Act and proclamation of the Privy Council brought to the port and harbour of Lamlash, from the kingdom of Ireland, a boat loadned with victuall, the pannel lawfully might and was commanded and warranted by the proclamation of the Lords of Privy Council bearing date the 3d of March 1670, to apprehend and seize upon the said boat and victuall, and accordingly in obedience of and conform to the said proclamation its offered to be proven that the pannel did actually make seizure upon the said boat and victuall and entered the same and was in possession thereof by himself and others in company with him, and notwithstanding of the said full and absolute seizure and possession, its farder offered to be proven that the Defunct and his complices did thereafter forcibly enter the said boat and thrust and forced the said persons that were in possession of the same, out of the boat. And by the same violence did attempt to carry away the said boat and victuall after the said seizure. But being discovered by the pannel, he with some others did enter another boat, and having taken a shorter way did overlye the said boat and victuall and did require the Defunct in his Majesties name to restore the said boat and victuall that was seized upon, which they not only absolutely refused, but also their boat being of a far greater bulk did threaten to run down the other boat where the pannells were, whereupon the pannel had shot for the recovery of the boat and victuall seized upon in manner.

forsaid, and whereof they were in possession they were but *in actu licito*, and for which they were warranted by the forsaid printed proclamation, whereby all his Majesties subjects are required and commanded to seize upon all boats loaded with victuall from Ireland and to sink the same, so that the pannells their act of seizure being just and lawfull, and the Defuncts their resistance being altogether unlawfull whatever was the event and consequence of the said resistance and to what the same did degenerate tho' even to the case of slaughter, the same can fix no crime against the pannells, and most especially in this case where the pannells were not in the first act or attempt of seizure, but in the recovery of the boat and victuall seized upon, and whereof they were in possession. And after they had used all fair means and so in no law are liable, but what did ensue on the said resistance, it being constant in law that even *in defensionem rerum* that cannot be otherwise preserved, one may lawfully kill. Likeas the pannells before they had shot any gun were both threatned and in hazard of being run down with the boat where the Defuncts were, which is the same case as if in the execution of legall Dilligences by caption, poynding or otherwise upon a violent and unwarrantable resistance, mutilation should ensue, which in law can fix no crime against the users, their act being at first unwarrantable. And its acknowledged that the Proclamation of the Lords of Privy Council did not in the very first attempt and act of seizure immediatly authorise any person to shoot guns. Yet it is pretended as constant to law and reason that if against the attempt of seizure a resistance were offered and that Mutilation and resistance did degenerate upon the said resistance, the same cannot inferr or import the crime of Murder, even tho' it had been *homicidium ex proposito*. And far less in this case where it is evident that the pannells had no design of committing slaughter or mutilation, but only shot *ad terrorem*. And it was obvious and apparant that by the motion of the boat where the Defuncts were, the slaughter might have been occasioned tho the pannells were free of all design as certainly they were. 2° As the pannells were not guilty of the crime lybelled tho that any slaughter had ensued so that it could be reputed any crime, yet its evident

that the said slaughter was not upon forethought fellony, but in effect a casuall homicide or at the most *homicidium in rixa.* And it is offered to be proven that the slaughter that ensued did not ensue by the shot of the gun that was shot by Mr. Archibald Beith, and law and lawyers are clear and particularly Clarus in §§ *homicidium* N. 15 that where slaughters are committed not *per insidias et animo deliberato* but *in rixa* and upon sudden, that in that case *ictus . . . est considerandus et qui lethaliter non percussit non tenetur de occiso.* And it cannot be made appear that the Defuncts were killed by the shot of any gun shot by Mr. Archibald Beith, and if need bees the contrary is offered to be proven. 3° The forsaid Act of Seizure upon the said victuall, being beyond all question lawfull and warrantable by the forsaid Proclamation of the Lords of Privy Council, and the resistance of the Defunct upon their part altogether unlawfull, yet any slaughter that did ensue thereupon is but an excess and cannot make the pannel guilty of the crime of Murder whereupon to conclude capital punishment against them, all lawyers being clear in that title *de attemperandis pœnis delictorum* that any act which of its own nature *ab initio* was lawfull altho the same *ex post facto* did degenerate into a resistance or violence where Mutilation or Murder ensued, yet the committers thereof cannot be made liable of the said Murder and Mutilation, because the ordinar crimes, and in order to the ordinar punishment which is consonant to law *et pœnæ sunt potius mitigandæ quam exasperandæ.* And it is consonant to the late Act of Parl. exeeming casual homicide from capitall punishment. And the pannells are here in a stronger case, their act of seizing on the forsaid boat being altogether lawfull, and whatever ensued upon an unjust resistance cannot be fixed upon the pannells as any crime.

His Majesties advocate answers to the abovewritten Defence, That the proclamation and Act of Council whereupon the same is founded can be no ground for the forsaid Defence because the forsaid proclamation was never proclaimed, at least it cannot be made appear that the same was ever proclaimed either at the Mercat Cross where the Defuncts dwelt, so that they could be put *in mala fide* thereby to contraveen the same under

the high pains therein contained, or that it was ever proclaimed at the Mercat Cross of the Shire of Bute, where the pannells dwells, so that it could be a warrand to them to proceed be vertue thereof, and now to palliat so henious a murder.

2° The said Defence so far as it is founded on the said proclamation tho it had been proclaimed, as it was not, it is most irrelevant because the said proclamation albeit it contains an order to all his Majesties subjects, yet it could be no warrand to the pannells, Mr. Archibald Beith or his complices that went to assist him, in respect the said proclamation contains an order to proceed by way of . . . and to seize upon victuall and barks, which is altogether heterogeneous and improper for a person of the said Mr. Archibald's station, being a minister and in order and to whom any such orders neither are nor intended to be directed, it being most impertinent that churchmen who are or at least ought to be taken up with a sacred calling of so great weight that the spirit of God says (*quid idoneus*) should descend to imployments of that nature so heterogeneous to his calling, and by the Common Law of all Nations, all statutes, tho in themselves never so universall and comprehensive are ever to be understood *de personis habilibus*, and Ministers and present Churchmen are persons *maxime inhabiles* as to execution of such orders, which are altogether secular, and cannot be execute without diverting them from the duty of their own station, and without disturbance and discomposure, sometimes *rixa*, noise and tumult, then which nothing is more inconsistent with the piety and gravity of those of that station, and upon the ground forsaid, by the laws of all nations, where there is any religion, either heathenick or Christian, Churchmen are exempted from such *onera et munera personalia quæ expediuntur obsequio et labore corporis*. And by the Canon Law it is most express that Ministers who ought to be exemplar and should not be entangled with any such imployments, are priviledged and exeemed from all such Statutes and Orders, and if they execute them they are Irregulars. And by express Act of Parliament the liberty of the kirk and kirkmen are ratifyed, and all proclamations of the nature forsaid, yea Acts of parl. for rising in arms to pursue thieves and sorners, or for going

to roads and others of that nature, neither are nor can be understood of nor extended to Ministers. 3° Tho the pannells were in the case of the said proclamation, as they are not, for the reasons forsaid, yet the said proclamation could be no warrand to the pannells to make the said pretended seizure, much less to committ the crime of Murder lybelled, because the said proclamation is to be understood only in that case when victuall is actually imported within any haven or port when the same is unloaded, as appears by the former proclamations restraining the importing of Irish victuall, and in speciall by the proclamation of the date the 6 ffebry, 1667, whereby all persons in authority are authorized to prohibite the unloading of any quantities of Irish victuall. And in the case of contravention to seize or cause to seize on the same, which proclamation does clearly interpret the proclamation whereon the Defence is founded, which last proclamation adds nothing to the former, except only that viz. That whereas the former does only authorise Magistrates and persons in authority only, to seize, by the said proclamation all others his Majesties subjects being *habiles*, are likewise authorised to seize. And therefore seeing it will appear by the probation that the barge intended to be seized, was not within any port or harbour, but was *in alto mare*, and these to whom the said boat belonged, had no intention, and did never offer to unload at the said port, neither to sell any of the victuall within the said barge to any other person, there is not the least colour or pretence from the said proclamation to seize upon the said barge. 4° The said Defence is most irrilevant and the said proclamation can be no ground for the samen, in so far as all penall Statutes and Orders such as the said proclamation is, are *strictissimi juris* and cannot be extended beyond the precise words and letter, and *omissum habetur pro omisso*, and true it is that there is nothing enjoined by the said proclamation, but only to seize upon such barks as carries Irish victuall, and to destroy the said victuall, which as all statutes of that nature ought to be understood *similiter*, viz. that they should be seized upon if they be within the power of the seizer, so that they might seize thereupon *sine vi et armis*. And by the said proclamation there is no power given violently to invade, assault

or reduce by force of arms any such barks, and far less to kill and destroy any of his Majesties subjects, and to carry arms to that effect. And that this is and ought to be the meaning of the said proclamation is clear by the common law and municipall law of Scotland and by the proclamation it self, so far as it is a principle of the common law that *statuta* how universall and comprehensive soever, and all orders and mandats, are never extended *ad illicita* nor *ad majora* or *ad ea quæ nota non sunt digna nisi exprimantur ex specie* nor *ad ea quæ mandans in specie non mandasset* nor *ad ea quæ non solitus est mandare* nor *ad ea quæ si aliquando mandat non mandat nisi certa forma servata.* And true it is *portare arma*, to carry arms, is prohibite by the common law, and to carry muskets and hagbuts is expresly prohibite by diverse acts of parl. under high pains. And therefore it cannot be thought in any construction in law or reason that by that power contained in the said proclamation to seize upon Irish victuall and barks carrying the same, warrand is given to seize upon the same by force or violence. And in order thereto that power is given to carry and use muskets and such unlawfull weapons, unless the said proclamation carried an express power to that purpose and a dispensation of the forsaids Acts of parl. prohibiting the same, and specially seeing in the Commission from the Council which grants Commission for fire and sword and a power to use force and violence, the same is express and contains a special dispensation with the saids Acts of parl. made against forbidden weapons. And the using of force to seize them by way of invasion, being *magis* and a power of a higher nature then the seizing of victuall and barks, which may be done without great difficulty. And it cannot be thought that so high and great a power being *merum imperium* should be given and settled upon the meanest of people by the generall words of seizing, unless the proclamation had been speciall thereanent. Likeas it cannot be shown that ever the Council gave any such power *cuilibet* nor to any of the people to use violence in a military force, and to carry arms to that purpose. And when the Council are in use to give Warrand to use force and to proceed in a forcible way, the said power is ever given by express Commission to particular persons, and is most express as to the

power forsaid and is never given but against Rebells, either condemned by a sentence or outlawed. And it is absurd and onheard that so high a power was either pretended to be given or assumed against persons his Majesties free subjects and are pretended only to be contraveeners of a penal statute. And as this is clear by the Common Law, so it is a fundamentall in the law of Scotland that no person can be proceeded against and destroyed by way of Deed without a Warrand or Act of Parl. except in the case aforsaid, and Commissions given by the Council against the Rebells and outlaws, and the granting of Letters of Marque for reducing these that are in terms of hostility, being in effect nothing else but a warrand to seize upon by arms and force the royall prerogative, so that it is absurd to think that the like power of so high a nature should be granted only by an Act of Council against subjects and in generall terms. 5° Whereas it is pretended that the pannells had seized and was in possession of the forsaid bark, and that they might lawfully endeavour the recovery thereof, and being *in actu licito*, whatever ensued cannot fix a crime upon him, and that *in defensione rei propriæ*, if a murder ensue it cannot import a crime, and that the defender is in the case of casual homicide and that he was necessitate for his defence to shoot, fearing to be overrun, it is answered, that the said pretences in fact are most untrue and groundless as will appear by the probation, and the saids assertions in law are most unwarrantable in respect the pannells as is evinced, could not warrantably seize upon the said bark, and tho he had been warranted to seize upon the same, as he was not, yet he cannot pretend to have been in possession thereof, seeing by the said proclamation no such barks can be possessed, but if they could be seized, they with the cargo are to be destroyed. And tho the defender had been in possession of the said bark and had been dispossessed of the samen, yet he could not warrantably recover the same by force and arms, and far less to proceed to kill and destroy. And it is an assertion contrair to all law, and especially to that of Scotland, that upon any pretence it is lawfull to kill, except in one case for self defence, which is limited and qualified *in moderamine inculpatæ tutelæ*. And it is evident that the Defender is not in the case of casual

homicide by shooting of persons with hagbutis *et armis destinatis ad eadem* in no sense being casual. And whereas its pretended that the boat wherein the Defenders were was like to be overrun, its a most frivolous false pretence as will appear by the probation, that the said bark was so far from making any opposition or resistance, that it was sailing and going away. And as to that pretence that *in actu licito* whatever the event and consequence be, it cannot fix a crime, it is most unwarrantable, seeing no *actus* can be said to be *licitus* unless it be said to be such as to all the circumstances. And tho it had been lawfull to attempt and endeavour the recovery of the said bark, yet it was no ways *licitus* to do the same *modo illicito* by force and arms, by assaulting and killing the king's free lieges. 6° As to the second member of the defence, that *in rixa singuli ictus* are to be distinguished and considered, it is answered that when the lybell shall be admitted to an Assise, they will distinguish as accords, and the said member contains no relevant defence why the lybell should not be put to the knowledge of an Assise. And the truth is it cannot be contended that the Defender is in the case of *rixa*, which is when a number of persons are engaged together, whereas the Defender was at a distance and not near the Defuncts, being in several boats. And whatever be the opinion of forreign lawyers, by the law of Scotland it is uncontroverted when any person or persons are killed by any partie or number of persons having offensive weapons and arms, the partie who gives the stroke or shot and all his complices who has arms, especially when they strike, are all guilty without any exception. 7° As to the last member of the Defence, viz. that the Defender being warranted to seize the said bark, the most that can be inferred against him is that he has exceeded, or according to the tenet and opinion of Lawyers *pœna est temporanda*, it is answered that the said member does not contain a Defence why the Dittay should not be put to the knowledge of an Assise, but an insinuation *ad pœnas temporandas* which is not proper *hoc loco*, and it is most unwarrantable, seeing it is *petitio principii* that the seizure is warrantable.

Sir George M°kenzie for the pannells replies that *maleficia præpositum distinguit* and this holds especially in murder where

it is the design that makes the crime, which design must rise from some personal revenge or gain, neither of which could be pretended in this case. And as the law punishes the slaughter of any of his Majesties subjects, so it has a great respect to the obedience of his Majesties commands. And it is not so unjust as to punish a mistake of zeal in his Majesties service, especially where obedience is required as a duty, and nothing could retort the obedience of such laws as this is, that such as obey it might be capitally pursued for misunderstanding the nature of a command which even lawyers may debate. And in such cases all persons tho commanded would think it safer to abstain from serving his Majesty and obeying the law where the hazard was so great, which may clearly appear to be very dangerous from the instances of such as are commanded to assist in the taking of Rebells and following the huy and cry after night thieves, in executing Commissions of fire and sword, in assisting letters of Mark. In all which and such like cases the subjects had very good reason, if this preparative were sustained untill they first consulted his Majesties Advocate how far they might do the same without hazard of their life. Since then the pannel had no design to kill and had more then a superior pretext, and in effect a command, it is humbly conceived that what he did cannot infer Murder so as to make him liable to capital punishment.

1° To the first Answer it is replyed that their being a proclamation publickly emitted and now owned, the Pannel is not obliged to debate or prove it was published, or else no man should obey a proclamation till the publication of it were proven to him, which were very absurd, but the proclamation is now owned and so there is no room for debate.

2° To the second it is replyed that tho' the Minister was not obliged to concurr yet his concourse cannot therefore inferr a capital punishment. And if a Minister should concurr against Robbers, night thieves or traitors, tho he be not thereto obliged, yet his concourse could be no crime. That that case is introduced in his favours and so cannot be obtruded against him, but in this case, there being penury of men in an Isle to execute the Act, it was very allowable in a Minister.

3° To the third the proclamation is opponed bearing that

victuall should not be imported, and certainly when a boat is att anchor and the men all ashore, as in this case, the victuall cannot be said but to be imported, and a mistake of a naturall propriety of a word cannot be stretched so far.

4° To the fourth it is replyed that tho' the Statutes should be strictly interprete, Yet in favours of a man's life and to defend against a crime, all Statutes should be favourably interprete especially in favours of subjects who obey them, for it were very hard that any of the leiges should be ensnared by the publick faith of the lawgiver, but here it is very clear that the proclamation does command not only seizure *sine vi et armis* as is hereby pretended but that certainly all means are hereby allowed which may effectuat what is commanded *et quando aliquid conceditur omnia concessa videntur sine quibus effectus non potest conduci.* And if the Council having allowed sinking, certainly they could not but allow the using Arms, seeing without that the Council's command could not but prove ineffectuall. And if arms had not been allowed, it is not to be imagined that any person whatsoever would have, upon a simple desire without force, obeyed, especially where they were to quit their own Cargo and victuall, which is presumable no man will do upon an entreaty without arms. But as where even the law commands any person, it cannot but allow them arms in prosecution of what it commands, so arms were absolutely necessar in this case, where the persons invaded used resistance and by that resistance and intromission with what belonged to his Majesty, they became thieves and robbers, for certainly the boat by the seizure, became his Majesty's, and its offered to be proven they stole the boat away, so that in effect they became robbers and thieves, and by express Act of Parl. it is lawfull to kill in the following of thieves and robbers, and by that Act all killing in that case is declared to be no Murder nor punishable. And whereas its pretended that it cannot be imagined the law would allow every private person to kill except it had been expressed, it is replyed that 1° The Law allows sinking of the boat, and if it cannot be sunk without killing, it is not to be imagined that the law would make killing a Crime, and since it is uncontroverted, but that these who were in the boat were making resistance and absolutely refusing

to be seized, might be killed or else the law could not receive execution or obedience, but that they having taken away the boat after it was seized, they might much more if they refused to give her back but defended her by arms, they might in that case have been killed, seeing that was a greater crime than the other.

5° Its answered that the Defences are opponed and is referred to the probation.

6° To the 6. it is replyed that not only all forreign lawyers are very clear, and not only have we no express law to the contrair, but the principle is agreeable to reason, ffor where there is a design to murder, if the murder ensue, it is very just that because of the design, all the assistants should be liable, seeing the law inferrs only a crime either from *præpositum* or *eventus*. But where neither design nor do a deed which may make a Crime, in that case, etc.

Mr. Andrew Birnie for M°Gibbon the other pannel says, the principal Defence is that the seizure is lawfull and therefore whatever may be the consequences or mischiefs following, they are chargeable upon the partie that *dabit operam rei illicitæ*. And which may be instanced in many cases in our law, which frequently occur, as after goods are poynded ordinarly there is contention and debate and which often resolves in blood and death. In which case the persons doing legall Dilligence are liberate by the law, and where *defensio est illicita, offensio est licita*. . . . For the pannel M°Gibbon his case is singular and otherwise circumstantial than the Minister, and therefore the King's Advocate's Reply is chiefly founded upon the inhability of the person and his unfittness, and upon the common ground against the carrying of arms, neither of which qualifications strike against M°Gibbon being a secular person and a fowler to his trade. And as it is altogether that he did any execution by shooting, so albeit he had shot, it cannot be pretended that the shot was intentionally designed upon the Defunct, and which without design by the rising and falling of both vessels, might have done prejudice. And the seizure could not be performed in this case without arms and also violence in the case of resistance, to have their recourse to law for Dammage and Interests. ffor if the seizure be not made effectual by force

and violence, the goods and persons being forreigners and sometimes enemies, the law and the intention of the lawgiver should be altogether frustrate. And seeing the proclamation does expresly command sinking of the vessel, it imports that the vessel might be *in alto* and riding, and which could not be done within a harbour. And that she designed for Scotland is clear, and was not driven in to this harbour for stress, in that she touched and arrived at Irving, and finding hazard of being seized then she came to this place, being more private, secure and ill attended. And both vessel and victual being appointed to be sunk, the seizure is lawfull even before the ship was on land. And if in the sinking of the vessel, which is but as lawfull as the seizure, any of the Defuncts had made resistance, and had either by violence repulsed or accidentally had drowned with the vessel *quid juris*, would not his blood been upon his own head, in respect whereof the pannel ought to be assoilied.

Mr. John Eleis for the Pursuer, repeats and oppones my Lo. Advocate's Reply, and furder adds that *esto* the seizure had been lawfull and the boat taken away by the Defenders in manner pretended by the Defence, yet it was absolutely unlawfull to retake the same by arms, unless it could be pretended there was an absolute necessity therefore, which cannot be alledged in this case, not only because it cannot be alledged that there were any positive acts of resistance committed by the owners of the boat, but also because there was a remedy competent to the pannel, viz. the Defuncts being Scotsmen and bound for Irving, they might have been seized there or pursued before the Judge ordinar for Dammage and Interest. Especially being Scotsmen and dwelling in Irvine specially the same cannot be pretended, for the pannells, seeing if they had obeyed the proclamation by sinking the vessel when they seized the same, the forsaid retaking or slaughter could not have ensued, and so the pannel having given occasion to the slaughter himself, he cannot pretend impunity from the punishment appointed by law. As to the pretence that the proclamation does appoint them to sink the vessel with the whole cargo, the proclamation is opponed which can only be understood *civiliter*, and to be done by persons authorised for that effect. And when the samen cannot be done without

arms, or destruction of his Majestie's subjects, where dangerous effects such sinistrous interpretations of the forsaid Act of Council might import, there needs no more pregnant instance to be adduced then the case in question.

Interloqr. The Lords Commissioners of Justiciary found the Dittay and Reply relevant, and in respect thereof repells the Defence and Duply and ordains the same to pass to the knowledge of an Assise.

Verdict. The Assise all in one voice except in one, ffand these two pannells, Mr. Archibald Beith and Donald M^cGibbon, guilty of the Crimes of Murder lybelled. And upon the 17 June 1672 the Lords Commissioners of Justitiary decerned and adjudged them to be taken to the Mercat Cross of Edinbr. and that betwixt two and four hours afternoon, to have their heads seperate from their bodies, and all their moveable goods and gear to be escheat to his Majesties use, which was pronounced for Doom, but reserved the time of the putting of the said sentence to execution to themselves.

Wee see by this Sentence, which has no definite time of Execution, that the Justices were unwilling to meddle with the blood of these pannells, and the Sentence was made so upon design to give time to procure a remission, which afterwards was procured by the intercession, I suppose, of Churchmen, for both they and others were grieved to see a Churchman guilty of blood, and thought it might be a reproach if he died for it. This also was another cause, that tho by all the three witnesses it was evident there was three shot fired upon the Irish boat, two by Mr. Archibald Beith and the third by M^cGibbon at his command, and that Gardiner was killed by one of the shots, and the skipper mortally wounded in the head by another. Yet it was as evident from the said Depositions that there was no design of killing, ffor the two last witnesses depone that when Mr. Archibald commanded M^cGibbon his servant to shoot, he also commanded him to shoot high to fear the men that were aboard in the bark, which took off all design of killing. This being joined with the express command of the

Privy Council's Act whereupon the Defence is founded, and whereupon it is pleaded that it was safe to kill those that imported Irish victuall if they should resist, made the cause to be difficult and inclined the Justices to give way to a remission, but yet it was thought fitt to condemn the pannells to terrify others from such rash acts.

The said 17th day also Robert M^cCulloch of Kirklach for Incest continued.

Edinbr. 24 June 1672.

Andrew ffraser of Kinmundie, and John ffraser of Newtoun are unlawed for not reporting of Criminal Letters raised at the instance of James Low tenant in ffingtoun against Captain William Middleton of . . . . . and others for oppression.

Edinbr. 8 July 1672.

Patrick Tilloch, brother to Tannachie, for Theft, Robbery and Oppression, in respect Dilligence done against the Witnesses, and they not compearing deserted, the witnesses unlawed.

Edinb. 15 and 16 July 1672. The Justice Clerk, Colintoun, Strathurd, Castlehill, Newbyth and Craigie present in the Court.

Sir Alexander Cumming of Culter agt. Gordon and Ereskine for wrongous imprisonment convict and afterwards the pursuer grants a Discharge of his part and the King grants a remission.

Sir Alexander Cumming of Culter and the King's Advocate against David Gordon of Achoynenie, James Gordon of Tarpersie, Mr. James Spence in . . . . . and John Ereskine, messengers, indited and accused that where notwithstanding by the laws, acts of parl. and practick of this kingdom, the Crimes of Convocation, wearing of forbidden weapons and the unwarantable taking and apprehending of his Majesties leiges and incarcerating of them and the crime of hamsucken and breaking of their houses under cloud and silence of night, and the crimes of Robbery, Theft and Deforcement of his Majesties officers, are crimes of an high nature and severely punishable. Nevertheless it is of verity that the said Sir Alexander Cumming being charged by vertue of Letters of Horning at the instance of the said Mr. David upon a Decreet Arbitrall to make payment of a sum, and their being a suspension and reduction thereof raised and duely execute and intimate and

frequently debated in the Session and the Decreet being suspended and reduced for the greatest part of the sumes charged for and only found orderly, proceeded for 300 merks not simply but upon condition that the said Mr. David should grant a Discharge lybelled. Notwithstanding whereof and that the said Mr. David was present at all the Debates and did never grant the Discharge, yet he went privately homwards from Edinbr. and Convocate a number of people to himself and came to the pursuer's house of Culter, broke up the doors thereof, wounded his servants and did take the pursuer as prisoner and forced him to give a Bond to present himself at Clunie on the day lybelled which the pursuer willingly granted, knowing nothing that had past at Edinbr. in the proces untill his Advocates informed him thereafter, and accordingly presented himself and offered the 300 merks under form of Instrument providing the said Mr. David would grant a Discharge conform to the Lords Interloq^{r} which he refused to do but pretended he had a Decreet of Suspension and read a long paper, saying it was that Decreet and that he had a Caption. And when the 300 merks was numbred, they poinded it without shewing a Warrand, and notwithstanding threatned him with prison for the money of the Decreet which the Lords had suspended, and to take him to the prison of Inverness, a great distance from his house, and having carried him a part of the way, the said Messengers did poynd his horse for their expenses and left the said Sir Alexander to go home. And having accordingly gone home to his house of Culter, they again came back and invaded his house of Culter, and did take him prisoner to Aberdeen where they did incarcerate him, and their detained him for the space of 15 days till he obtained a new suspension, which the Lords granted without Caution or Consignation. And which last violence they committed because the Pursuer would not ratify the Messengers poynding of the horse and their other illegal procedure. Upon all which illegal deeds the pursuer took instruments and protested for remeid of law. In doing of which deeds the said Mr. David Gordon and the other Defenders have contraveened the laws and acts of parl. which being found by an Assise they ought to be punished.

Sir Andrew Birnie for the pannell Mr. David Gordon, alledges that he having his Estate and living within the Regality of Spynie he ought to be repledged from the Justices to the Regality Court, and also the said Sir Andrew compeared for the Heretable Baillie of the Regality, viz. Sir Alexander Innes of Coxtoun and produced a procuratory for that effect, and which replegiation is founded upon express law, viz. here he cites Act 29 of a blank parl. concerning an annexation and calls it a late Act of parl. which therefore I suppose must be act 31 unprinted, par. 23 Jam. 6 intituled Ratification in favours of the Lord Spinie, by which Act, says he, it is expresly provided that notwithstanding of the annexation of these Regalities to the Crown, that the lords and baillies of the Regalities shall have right to repledge even from the Justices. And which Act has been in constant observance in the Decisions of this Court, and after contentatious debate. And albeit the Act of parl. does allow replegiation only where the Lord or Baillie of the Regality has been the first attachers, it is answered that this clause being a restriction of that jurisdiction that is competent to Regalities by the Common Law, it cannot be extended beyond the express terms of the Act, which is that where the Baillie of the Regality has been the first attacher, he may repledge, but is not express in excluding, even where the Justice has been the first Attacher, which not being expresly Statute, it is left to the Disposition of the Common Law. But 2° even where the Justices has been the first attachers, the Act of parl. does expresly allow the Lords and Baillies of Regalities to be joined to the Justices if they desire it, and which right and priviledge is expresly and judicially acclaimed by the forsaid baillie of Regalitie. In respect whereof

Replys Advocatus, 1° He takes Instruments that the Defence is only proponed for Mr. David Gordon. 2° Coxtoun has no interest to propone this Defence since he does not appear, and it is not instructed that there is such a Regality or that Coxtoun is baillie thereof, and the Instruction produced, which is a precept under the quarter seal and seasine following thereon in his favours upon a Comprising against Mr. John Innes of Leuchars of the office of Bailliary of the said Regality.

can be no Instruction tho' the comprising and charter were also produced, unless the Debitor's right was also produced, because all Comprisings and Infeftments thereon go in course and are *periculo petentis*. 3° Suppose Coxtoun did instruct a sufficient right to the Bailliary, yet the Alledgeance proponed in his behalf is not relevant, because the crime was not committed within the bounds of the Regality, nor does all the Defenders dwell within it. And albeit Mr. David Gordon, one of them, dwells therein, yet seeing the rest who dwell not therein, are subject to the Justice Court the cause *ob contingentiam* cannot be divided, but all of them must answer before his Majesties Justices, especially seeing his Majesties Advocate is pursuer in behalf of the publick interest, and cannot be obliged to pursue before any other Court but his Majesties Supreme Court of Justice. And it is most clear by the Act of Parl. whereon the Defence is founded (which as the Advocate cites it is the Act of Parl. 1587 and must be the generall Act of Annexation, which is the 29 Act parl. 11 Ja. 6 which contains a *salvo* in favours of heretable Baillies and Stewarts of the Church lands) that this Judicature viz. the Supreme Court, being now possessed are the only competent Judges of the case in question, not only upon the considerations forsaid, but also because they have prevented by citing the said pannel Mr. David Gordon, who being cited was declared fugitive, and thereafter suspended to the 10th June last, and having appeared the said day and again found caution to this Diet, the process is now in that case that it cannot admitt of any repledgement, and the baillie of Regality, if there were any such Regality, has no prejudice, seeing whatever benefit may be pretended to by his infeftment by the conviction of the pannel, will be reserved as accords.

Sir George M^c^kenzie for the pannel Duplies to the second Reply, that the comprising and Infeftment under the Great Seal proves sufficiently, seeing its offered to be proven from the Journal books that his authors right has been sustained and replegiations granted conform, which is sufficient in all time coming for that Regality, without producing of the right thereafter. And seeing also its offered to be proven that Coxtoun is in present possession of this Bailliary.

To the 3d *Contingentia causæ* cannot prejudge the Baillie, ffor if no pursuit wherein the Advocate is engaged could be repledged, Regalities would signify nothing. And as to what is pretended upon the Act of parl., its duplied, that tho the Justices be judges competent to these crimes if there be no replegiation, yet if there be a replegiation it excludes them tho there be prevention, or else regalitys could have no privilidge beyond Inferior Judicatures seeing any competent Court has the priviledge of excluding the Justices in case of prevention. Therefore either the Regalities have this or they have no priviledge of replegiation, and the Act of parl. does not at all decide this case, but expresses only a case in favours of the Lords of Regality. But the constant custom of the Court is the Rule whereby its most clear that the Justices have been always after finding of Caution before them, and lately in the case of the Earl of Anandale, in use to grant replegiation, and the pannell's appearance nor no other act of his can prejudge the Lord of Regality.

The Lords Commissioners of Justitiary repells the Defence and Duply in respect of the Reply.

Mr. Alexander Anderson,[1] for Coxtoun, protests that this Interloq^{r} be but prejudice of his right, and thereupon takes Instruments.

Sir Andrew Birnie for James Gordon of Tarpersie, another defender, alledges that the lybell, so far as concerns him, is not relevant, because nothing is lybelled but his being present with Mr. David Gordon, and it is not speciall as to any deeds of his accession, for he did not hound out the messengers nor other parties, nor approve their proceedings. And there is no more pretended against him but that after Culter was apprehended he mett and treated for an accomodation, which is not sufficient to inferr any accession to the crime. Defence *in causa* for Gordon of Tarpersie.

Replys Sir George Lockhart, that he oppones the Lybell bearing that Tarpersie and the haill other pannells are guilty accessory art and part, which is unquestionably relevant. And by the Act of Parl. anent art and part, viz. Act . . . par. . . . Ja. 6 does not tye the pursuers in criminall Lybells to be more

[1] Admitted advocate, 9th December 1665.

speciall, and how far Tarpersie shall be found accessory is not competent *hoc loco* but before the Assize after probation.

Interloqr. The Lords Commissioners of Justiciary fand the Dittay relevant and ordained the same to pass to the knowledge of an Assize.

Verdict. And upon the 16 of July instant, the Assize all in one voice except two fand John Erskine, the Messenger, guilty of entering violently the house of the Pursuer, under cloud of night. And fand Mr. David Gordon of Achoynany, Pannell, accessory thereto, as also both guilty in taking illegally 300 Ms. and a horse from the Pursuer. They fand also both the Pannells forsaids guilty of unwarrantable taking and incarcerating the person of the Pursuer, and assoillies James Gordon of Tarpersie.

After reporting of this the Justices continues the pronouncing of the Doom till the 22 instant, and there I find no mention of it. But on the 29th day Mr. Thomas fforbes[1] compears for Mr. David Gordon, the pannell, and produces a Discharge of the said Process, and desires it to be registrate in the Books of Adjournall, which is accordingly done, but on the 2d December next, they are fugitives for the King's part and afterwards remitted, *vide* 9 ffeb. 1674 where the Remission is recorded.

There is nothing more the said 15th day but that Grissell Rae, Margaret M'Guffock and Janet Howat, prisoners in Kircudbright, for Witchcraft, gives in a Petition to the Justices, whereupon they are ordained to be sett at liberty upon caution for their appearance before them the 3d day of the next Justice Air, to be holden at Dumfries, or sooner upon 15 days warning.

Edinbr. 22 July 1672, present Lee, Strathurd, Castlehill, and Craigie.

Halliday agt. Ireland and others, oppression deserted. The said day Mr. Alexander Ireland,[2] minister att Tilliebole,

[1] 'Formerly admitted under ye Usurpers.' Re-admitted, 18th June 1661: second son of Walter Forbes of Tolquhon; succeeded his brother, Sir Alexander, as twelfth laird, married Lady Henrietta, daughter of the twelfth Earl of Buchan.—W.

[2] Ordained, 1659; deposed after the Revolution for immorality.

Major James Mercer, and diverse other persons, dilated, indited and accused at the instance of John Halliday for his interest, that contrair to the Laws made against Convocation, wearing of arms, hamsucken and invasion, they on the first of May 1672 when the said Mr. Alexander was to be tried before the Presbytery of Auchterarder for misdemeanours laid to his charge by the said John Halliday, did come to the Diet with a number of the leiges convocate by them, all in arms, and there beat and wounded James Patoun one of the Compl[rs] and threatned John Paton in Cowden for offering to own the said John Halliday and upon the 22d of May the said Mr. Ireland came to John Halliday's house at Tilliebole, accompanied with many highlanders and fired a pistol at him and did strike the said James Paton over the head with a pistol to the effusion of his blood, as also Coline Ireland another of the Defenders, did beat the said James Paton with hands and feet because he came there to serve the said John Haliday as a Nottar, as also its lybelled that the said Mr. Alex[r] Ireland in the month of Novemb[r] 1670, and other times lybelled did beat William Dempster and Andrew Hutcheon, aged men, James Kid and James Gib, two other of the compl[rs] and invaded them by way of hamsucken, under cloud and silence of night, through the doing of which respective deeds the forenamed persons have contraveened the laws and acts of parl. and ought to be punished.

The Debate.

Mr. John Eleis for the pannells alledges, that the said lybell which contains a congestion of several pretended articles of misdemeanour patched up to the number of 7 or 8, of purpose to render the minister and his profession odious and despicable, is altogether false and calumnious, and for which he being formerly accused before the Ecclesiastick Judicatory, he was assoilied and found to be injured. And as this lybell is false, so for the most part it is inept and irrelevant, and particularly the first is so, which bears that the Minister did convocate the leiges, seeing all Convocations are not prohibited but such as are contrair to law and without lawfull authority, which cannot be subsumed in this case where it is offered to be proven that at the time lybelled there was a visitation and sermon at the church lybelled and the people did convocate to hear

sermon, and its presumed *presumptione juris* that they did convocate for this end unless the pursuer will offer to prove that they were convocate in order to the committing of the crimes lybelled. And as to Hary Drummond's beating of the nottar (which is denied) tho it were made out it cannot infer a crime against the Minister, who gave no order for that effect *et delicta tenent suos authores.* Likeas the Nottar has disclaimed the pursuit. And as to the 2d part of the Dittay, viz. that Mr. Alexander Ireland brought down the highlanders, he conceives the same to be no crime in it self unless it had been accompanied with the violence committed by them, which cannot be pretended in this case, ffor all that 's lybelled is that Charles Steuart one of their company, shot a pistol, which can only import against the said Charles himself.

As to the 3d and remnant members bearing that upon the day of [1] the Minister did beat Hutson and committ hamsucken against Gib, the pannel cannot be obliged to answer to such a lybell which does not condescend on the day, month nor year *et in criminibus non licet vagare.* ffor by not condescending thereon the defender is prejudged of his Defence *Alibi*, and where this assaulting of Gib is lybelled to be hamsucken, the same is altogether irrelevant unless it had been lybelled that he as a master of a family had been assaulted or besett in his own house, ffor this is the true notion of hamsucken, and is founded upon that maxim or principle *unicuique domus sua tutissimum refugium*, which cannot be said of Gib or any other of the servants, seeing none of them can subsume that he was invaded *in domo suo* they being only in their master's house. And if need bees the Minister offers to prove that Gib was his own servant at the time. And suppose he had been invaded at another man's house, yet *non relevat* because Gib is now dead, and the master of that house disclaims the pursuit.

Replys Sir George M^c^kenzie for the pursuer that the first part of the Lybell stands yet relevant notwithstanding of the Defence, bearing that they came to the visitation of the Church and to hear sermon, unless it were alledged that they

[1] Also blank in Adv. MS.

were necessary persons to the visitation or that they were parishners who were obliged to hear the sermon, none of which can be pretended. And if need beis its offered to be proven that they lived at 17 miles distance from the Church, and that they came there in arms and waited on Mr. Alexander Ireland, the pannel, and if this be not sufficient to qualify an unlawfull Convocation, then every Convocation may be palliated by such pretexts.

To the second its offered to be proven that he either sent for the highlanders, or at least he did use their illegal concourse, and by them did threaten the pursuer and his friends for owning Tilliebole in this just pursuit.

To the 3d. Tho the time be not condescended on, yet hamsucken is unlawfull at all times, but it is condescended that it was in the night time on St. John's Day, being in August or Septemr 1666, which is sufficient to make a hamsucken, and the Master's disclaiming is not sufficient, seeing the pursuit is at the instance of his Majesties Advocate. Likeas it is most unwarrantable to alledge that by our law, hamsucken is only committed against Masters, for certainly the beating of a servant in his Master's house is hamsucken, and as to the rest of the Articles, they are relevant and nothing said against them.

Duplys Sir Robert Sinclair for the pannels as to the Convocation, repeats the former alledgeance, and there was none who did convocate but either the parishners or parties having particular commissions and interest in the visitation, which can infer nothing upon the Minister or the rest of the pannells, and tho they had convocate yet *quid inde* seeing there is no deed of violence lybelled to have been done by any of the multitude, except that Hary Drummond, the minister's good brother, did beat and threaten the Nottar, which is only relevant against the said Hary himself. And as to the second part of the Reply, it ought to be repelled because the time ought to have been lybelled *ab initio*, in which case the pannel would have taken out Letters of Exculpation and have proven *alibi*, which he cannot now do. And to the 3d part of the Reply anent the hamsucken, it ought to be repelled, for albeit the beating of a servant may infer a ryot

being pursued either at the Master or Servant's instance, yet it can never be hamsucken unless the servant had been beaten and invaded in his Master's defence, and it is neither lybelled nor can be proven that the house of Kid the pretended Master was invaded or violence offered to him.

Triplys Sir George Lockhart, that he oppones the lybell.

Interloquitor. The Lords Commissioners of Justitiary ffand these articles of the lybell as to the Convocation upon the 1st and 22d of May last, not relevant *ut libellantur* in respect the pursuer judicially acknowledged that the second meeting upon the 22d May was likewise occasioned by a presbeterial meeting. And to that part of the lybell anent the beating and bruising of James Paton, Nottar Publick, the first and second times, the Lords ffinds that the Pannells cannot pass to the knowledge of an Assise in respect of James Paton his disclaiming the pursuit as to the haill Defenders except Charles Steuart, whom the Lords ffand not lawfully summoned. And as to that Article anent Hary Drummond's threatning John Paton, the Lords find the samen not relevant *ut libellatur*. And as to that part of the lybell anent Mr. Alexander Ireland his beating and bruising William Dempster the time lybelled, ffand the same not relevant *ut libellatur*. And as to the other acts anent the beating and bruising of Andrew Hutson, fand the same not relevant *ut libellatur*, in respect the committing thereof is blank in the summonds both as to the day, month and year. And as to the last article anent the said Mr. Alexander Ireland his entering into the house of James Kid, the Lords ffand the same not relevant, in respect the day, month and year of the committing thereof are all blank.

James Guthrie, ffeltmaker in Edinbr. is unlawed for not reporting Criminal Letters at the instance of the same pursuer against other Defenders in the same cause, and duely execute.

Edinbr. 29 July 1672.

Adam Wright in Cardin agt. Thomas Mulligan there for hamsucken, the pursuer passes from the pursuit and the Diet is deserted.

The same day there are expenses modified to the witnesses

adduced by the Laird of Culter agt. Gordon and Culter ordained to pay them at 16*s.* p. diem to a horseman and 8*s.* p. diem to a footman.

Mr. And^r^ Kennedy *alias* Weir for Treason fugitive.

The said day also Mr. Andrew Kennedy[1] *alias* Weir of Closeburn being often times called to compear before his Majesties Commissioners of Justitiary the said day and place in the hour of cause to have underlyen the law for the crime of Treason underwritten, viz. for entertaining correspondence by writt and otherways with Mr. Robert M^c^quair,[2] Mr. Robert Traill[3] (who were ministers banished from this countrey and who then resided in Holland) and with diverse others disloyall and disaffected persons, authors of seditious pamphlets and particularly of these pamphlets entituled *Jus Populi vindicatum* and *Naphtali*, and for receiving and dispensing these pamphlets among disaffected persons here and in England, and for keeping company and converse with seditious traitors and fugitives and for other crimes at length specified in the Criminal Letters. As he who upon the of July instant was lawfully charged by Robert Knox, pursevant, for that effect, lawfull time of day bidden, and the said Mr. Andrew Kennedy not finding caution acted in the Books of adjournall for his compearance nor yet compearing to underly the law for the crimes above mentioned, the Lords Commissioners of Justitiary decerns him to be put to the Horn and all his moveable goods and gear to be escheat.

Compears Mr. William Murray and Mr. John Eleis, advocates for the said Master Andrew, and takes instruments that there is but 13 days betwixt the day of the charge and the day of the compearance, therefore wee find afterwards that he getts a new lybell to the 20th of August, whereupon he is again declared fugitive at that Diet where his lybell is more fully sett down.

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[1] Wodrow calls him Sir Andrew Kennedy of Clowburn. He survived the Revolution, and after that event acted as Lord Conservator in the Low Countries.

[2] This should be 'M'Vaird.' He was minister in Glasgow, and banished by the Privy Council in July 1661 because of offence given in a sermon.

[3] Mr. Trail, who was minister in Edinburgh, was taken bound upon 11th December 1662 to remove forth of the king's dominions within a month, under pain of death.

Edinbr. 19 August 1672.

John Craig of Cults being called to hear Doom pronounced against him for the crime of Adultery, the Lords Commissioners superceeds the pronouncing upon the representation from the Lo. of the Exchequer, he finding sufficient Caution for payment to John Sommerveil, macer of Exchequer, of the sum of 700 ms. contained in the delivery of his Bill given in to the Exchequer, and of the said James his expenses depursed thereanent or so much thereof as the Lo. should think fitt.

Eod. Die.

Adv. and L^d^ of Culter agt. Gordon and Erskine.

The Lo. Commissioners of Justiciary continues the pronouncing of the Doom in the Action the Laird of Culter against Mr. David Gordon and John Erskine, messenger, for the wrongous imprisonment and other Riotts, whereof he was found guilty upon the 15 of July last and that untill the 2d of December next to come, and Mr. Thos. fforbes compears and produces a Discharge from Culter from the said Mr. David and John Erskine of the plea, which upon his desire is here recroded, but this does not extinguish the King's part for afterwards wee find him declared fugitive.

Edinbr. 20 August 1672. Lords Lee, Colington, Newbyth and Craigie present.

Mr. Andrew Kennedy for publishing treasonable Pamphletts.

The which day Mr. Andrew Kennedy *alias* Weir of Closeburn, being oftimes called to have compeared before his Majesties Commissioners of Justiciary, the said day and place in the hour of cause to have underlyen the law for the crime underwritten, viz. the said Mr. Andrew having shaken off all ffear of God, conscience of duty and alledgiance to his majesty and respect and tenderness to his own countrey, presumed to committ the crimes underwritten, in swa far as, Mr. Ro^bt^ M^c^vair^d^, Mr. Ro^bt^ Trail, Mr. Livingston,[1] Mr. Brown,[2] and

[1] John Livingston, formerly minister at Ancrum, who had been banished in 1662. He died in Rotterdam about the date of this trial. He made a Latin translation of the Old Testament.

[2] John Brown, minister at Wamphray. In 1662, he was taken bound to leave the kingdom, and resided many years in Holland, where he died. He was considered one of the most eminent divines of the day, and was the author of a treatise upon prayer.

divers others seditious persons being under the lash and compass of law and justice for their seditious and disloyall practises, and owing to his Majesties unparrallelled goodness that their lives were spared, and that in lieu of that just sentence and punishment which by the law was due to them, and which justly they might have expected, they were banished and removed out of this Kingdome only, where they had not lived (nor their principles and temper being considered) could not live peaceable as becometh loyall and dutifull subjects, yet the saids persons having retired to Holland and dominions of the States of the United Provinces and forgetting their duty and his Majesty's favour, did resume, continue and prosecute their former seditious and disloyall practises with as much malice and greater boldness than formerly, conceiving that they were out of his Majesty's reach, authority and justice, and ever since they retired out of his Majesty's Kingdoms has made it their work to hatch plot and contrive most horrid, bloody and treasonable designs against his Majesty's Government and for disturbing the peace and quiet of these Kingdoms and involving again and imbruing their native countrie in blood and combustion, and in the tragicall calamities of a civill and intestine war and Rebellion under which it had laboured and groaned for many years and had been the subject of compassion even of strangers, and in order thereto, having framed divers seditious and treasonable books and pamphletts the ordinary trumpetts and engines of sedition and rebellion, and in speciall *Naphtali* and *Jus populi vindicatum*, they sent the same home to this Kingdom to be divulged. Likeas they were divulged and dispersed of purpose to confirm those they conceived to be of their principles and perswasion and to poison, deprave and seduce others to the same, they did most seditiously stirr up the Estate where they lived and some of those who had interest in their Government to a war against his Majestie and for their encouragement did promise and suggest to them that they might expect aid and assistance, at least diversion, from a party of their ffriends here. They, at least some of them, did traffick and practise in England. To the same purpose they did send home, at least did endeavour to get them here to this kingdom, arms in order to their designs forsaids. And

for promoting and effectuating of the same, they had and kept conversation with disloyall and disaffected persons, and in speciall with divers who had been sentenced and forfaulted, at least declared fugitives for their accession to the late Rebellion, and in order thereto had their wives, friends, emmissarys and agents living in this Kingdom under the warmness and protection of his Majesties authoritie, and yet like vipers endeavouring the destruction of the countrie, and amongst others the said Mr. Andrew Kennedy was employed as a fitt and pernicious instrument. And in speciall upon the first and remanent days of the month of January, ffeb. and remanent months of the years 1670 and 1671 or ane or other of the days and months of the years forsaid, the said Mr. Andrew had sent home to him and did receive from the saids persons or one or other of them, most seditious and treasonable books, lybells and pamphletts and letters, and did divulge and disperse the saids books, and besides the letter sent to himself did transmitt, convey and deliver the letters sent to the same purpose to others, and did give returns and sent letters to and did keep correspondence with the forsaids persons or ane or other of them, and did otherwise industriously but disloyally endeavour to promote their designs forsaids, and did know and conceall and did not reveall the same, in doing whereof and committing of the saids seditious practises or one or other of them, the said Mr. Andrew Kennedy has committed and is art and part and has accession to the crime of Treason as at length is contained in the saids Letters and dittay abovewritten insert thereintill, as he upon the 3d August instant was lawfully charged by Rot^t^ Knox, Dingwall pursevant, to have found caution acted in the Books of Adjournall to the effect forsaid, the lawfull time of day bidden, and the said Mr. Andrew not entering to appear to the effect abovementioned.

The Lords Commissioners of Justiciary therefore by the mouth of James Comrie, officer of Court decerned and adjudged the said Mr. Andrew Kennedy of Closeburn, to be denounced our Sovereign Lord's Rebell, and ordained him to be put to the Horn, and all his moveable goods and gear to be escheat and inbrought to his Majestie's use as fugitive frae his Majestie's laws, which is pronounced as Doom.

I have sett down this Lybell at length which relates to the late Rebellion or Sedition, the laws upon which the proposition of the Dittay is founded, are not mentioned in the Books of Adjournall, ffor when a person compears not but suffers himself to be declared fugitive, then there is no more insert in the Book according to Stile, but the subsumption of the Dittay containing the ffacts and deeds which are the contravention of the laws. But the laws here ommitted must be Act 10 Parl. 10. Sess. 6, whereby its statute that all his Highness subjects content themselves in dutifullness and quietness to his Highness and his Authority, and that none of them presume or take upon hand publickly to declaim or privately to speak or write any purpose of reproach or slander of his Majestie's person, estate or government, or to deprave his laws and acts of parliament or misconstrue his proceedings, whereby any misliking may be moved betwixt his Highness and his Nobility and loving subjects in time coming under the pain of death, certifying them that does the contrary, they shall be repute as seditious and wicked instruments, enemies to his Highness and Commonweal of the Realm and the pain of Death shall be execute upon them.

Pronouncing of Doom against Mr. Arch^{d} Beith and M^{c}Gibbon, continued to the 1st December next.

Edinbr. 23 August 1672.

David Johnston son to David Johnston, of Closeburn, apprehended by the Sherriff of Lanerk and imprisoned in the Tolbooth of Edinbr. for alledged Bestiality, obtains liberty upon his ffather's petition to the Lords Commissioners, offering Caution in respect he verified he was but an Ideot and not able to entertain himself. Bestiality.

Edenbr. 16 Sept. 1672, present in the Court, Athol, Justice Generall, Lee, Justice Clerk, Colington, Castlehill, Newbyth and Craigie.

The said day John Smith in George Robertson, smith in Glasgow, Mathew Montgomerie in Eglisham and

Smith, Robertson, Montgomerie, and Armour for Robbery, Murder, Mutilation, Hamesucken, etc.

James Armour there, indyted and accused, that albeit by the Laws and Acts of Parliament and constant practique of this Kingdom, the crimes of Robbery, Murder, Mutilation, Hamesucken and Breaking of Prison are severely punishable by Death and forfaulture of the Committers lands, goods and gear, and escheat of their moveables especially when the saids crimes are committed against the Ministers of the Gospell, yet true it is and of verity, that the said John Smith having laid aside all fear of God and respect to his Majesties Laws, and having been with the Rebells who assembled themselves together *anno* 1666, and at the ffight of Pentland hills with them against his Majesties fforces, and having ever since that time lived in a constant habit of oppression and robbing of his Majesties good subjects, and particularly the Ministers of his Gospell, he came to the house of Mr. Alexr. Ramsay, minister at Affleck,[1] upon the of November last, accompanied with the said James Armour and Mathew Montgomerie, and armed with Swords, Pistolls, etc. and did rob the house and carry away the money and beat the said Mr. Alexr. with a Pistoll and wounded him with a sword, and forced him to swear he should never preach there again and upon the 2d of September last, the said John Smith accompanied with the said George Robertson did rob the house of Mr. David Cuninghame,[2] minister at Cambusland *in anno* 1668 and 1669, he the said John Smith accompanied with the said George Robertson[3] did rob the house of Mr. Rob. Black, minister at Closeburn,[4] and afterwards was taken prisoner and imprisoned in the Tolbooth of Tomhill, and afterwards broke the Prison. As also in the month of September instant, he did rob and steall away the horse, cloaths, and linnens of Capt. Wm. Barclay, having broke up his Stables and cutt his cloathbaggs.

The said George Robertson is indyted for having gone along with John Smith to the robbing of Mr. David Cuningham's

[1] Auchenleck, Ayrshire. Ramsay studied at St. Andrews, where he obtained his degree in 1665. He was transferred to Greyfriars, Edinburgh, in 1669.

[2] Graduated M.A. at Glasgow University, 1650; appointed to Cambuslang, 1663.

[3] 'did rob . . . . George Robertson' not in Adv. MS.

[4] 'Robert' should be 'William.' Graduated M.A. at St. Andrews, 1638; appointed to Closeburn 1647; died 1684.

house and for creeping in at the window thereof and opening the door to Smith, and for carrying away two burdens of cloaths and other stollen goods from the same to the said George Robertson's house, where the spoil was divided.

Mathew Montgomerie is indyted for being actor art and part of the robbing of Mr. Alexander Ramsay's house.

James Armour is indited of the same and of keeping of the doors at that time and wounding the said Mr. Alexander with a sword which he had in his hand, to the great effusion of his blood and hazard of his life. And all and ilk ane of the saids persons for having assisted and being in arms with the saids Rebells who rose in the West and fought at Pentlandhills, and for the Robbery against Captain Barclay.

The King's Advocate for probation adduced the severall Confessions of the Pannells, taken and subscribed by them in presence of a Committee of the Councill. This was before the Lybell was raised, all which confessions they renewed and subscribed judicially in presence of their Judges and Assize, and the Justice Generall and Justice Clerk subscribes for the two last who could not subscribe. This confessions are in every thing conform to the Lybell and were made use of when the Lybell was raised. Probation be Confession.

The Assize upon these Judiciall Confessions finds them guilty of the Thefts and Robberies lybelled, but ommitts Ja: Armour his wounding of the Minister, tho he confesses that as clearly as any other point. Verdict.

The Sentence of the Judges is, that all these four Pannells should be hanged at the Gallowlee betwixt Leith and Edinbr., betwixt 2 and 4 hours in the afternoon till they were dead, and that the bodys of John Smith and James Armour (who were the two principall Actors and seems to have induced the other persons to go with them and were so esteem'd by all persons) are appointed be hung in Chains till they rott and all their moveables arè declared escheat in the common form. Sentence.

Nota This Mr. Alexander Ramsay is the same man who is presently Minister in Edinbr. and was immediately settled in Edinbr. after this accident. And the said Geo: Robertson, pannell, was but few days before employed at the working the iron work in one of the stairs

upon the north west corner of the King's Palace, and made that piece of work, and because he was an excellent tradesman and was only accessory to the stealling of two burdens of Cloaths, many wished him to have been saved minding the *Lex ad bestias* 31 ff *de pœnis*, upon which Philippus Decius the great lawyer desired his scholars to plead for him when he was accused of a Slaughter. The words of the law are *ad bestias damnatos, favore populi præses dimittere non debet; sed si ejus roboris vel artificii sint, ut digne populo Romano exhiberi possint, principem consulere debet.* But because the Ministers at the time were in great trouble with such rogues, therefore no mercy was given. *Nota* 2° That Confessions emmitted before a Committee of the Counsell were not admitted here as sufficient probation till they were renewed by the Pannells in presence of the Judges and Assize.

Edinbr. 4 November 1672.

Mr. William Nimmo against Sir Wm. ffleming, commissary of Glasgow, for Perjury, continued to the 2d Monday of ffeb. next.

James Thomson in Drumturn declared fugitive for the Slaughter of John Alexander of West fforrest, declared fugitive.

Edinbr. 11 Nov. 1672, Present in the Court Strathurd, Preses, Castlehill, Newbyth and Craigie.

Carnagie for beating the Provost of Abberbrothick.

Robert Carnagie of Newgate, indyted and accused for the beating and striking of John Aikman of Cairnie, Provost of Abberbrothick, that notwithstanding by the Laws and Acts of Parliament and constant practique of this Kingdom, the assaulting, beating, troubling, molesting and invading of persons in publick authority, and particularly magistrates of Burghs, are crimes of a high nature, punishable as the crime of oppression, and particularly by Act 26 Parl. 4 Ja. 5, it is statute and ordained that no man, either Earl, Lord or Barron, or other person of whatsomever degree, about or adjacent to Burghs, molest, trouble or inquiet the Provost, Baillies, Alder-

man and officers of Burghs in using of their liberties and priviledges under the pain of being called as common oppressors of his Majesties Lieges at Generall Justice Airs, or at particular Courts, nevertheless it is of verity that the said Jo. Aikman, complainer, being upon the 26 of Aprile last in the actuall exercise of his Trust and Authority as Provost of the said Burgh, in conveening the inhabitants to pay certain Cesses and Taxations libelled for outrigging of seamen to his Majesties ffleet, conform to appointment of the Privy Councill, and the Defender is a Vassall of the Burgh being required to pay his proportion, he not only refused but beat the complainer with his ffist in the breast and did shake him too and fro and called him a knave, with severall other opprobrious expressions to the great contempt of authority, and thereby he has contraveened the saids Laws and Acts of Parl. which being found by an Assize, he ought to be punished.

Sir Geo: M^{c}kenzie for the Pannell alledges he ought not to pass to the knowledge of an Assize for the crime of beating of a Magistrate upon the Act of Parliament lybelled, because the complainer was no Magistrate in swa far as he had not taken the Declaration, and by the 5th Act 2d Sess. 1 Parl. Cha. 1. it is declared, that no person shall have right to his office till he take the Declaration, and if he had no right to his office, he was no magistrate. Likeas by the same Act they would take upon them the office of a Magistrate before they take the Declaration are accounted as Usurpers, and if in construction of Law they be looked on as an Usurper, they cannot in construction of Law be looked upon as a Magistrate nor have the priviledges of a magistrate, especially *quoad* this effect, that such as injure him shall be looked upon as contemners of Authority.

Replys Sir Geo: Lockhart that he repeatts and oppones the Dittay and the Act of admission and continuation produced whereby the Pursuer was elected and continued Provost the year that the crime lybelled was committed and did officiate as Provost that year, and having been Provost the former year and then having taken the Declaration and not being of new elected but continued in the 2d year, there was no need for him to subscribe the Declaration again, nor can the not sub-

scribing be imputed to him because he was absent the time of his continuation and admission, and the Declaration was never offered to him thereafter. And as to the Act of Parliament it can only be understood in case the Declaration had been offered and refused by the Pursuer, specially considering that the Subscribing of the Declaration is for a test of loyalty which the pursuer had sufficiently evidenced by his former subscribing. And it is sufficient for the founding and sustaining of this Dittay that the Pursuer was elected, continued, acknowledged and owned as Provost, and that he exerced the office the time of the crime lybelled, and it is criminall to offer injury to any person, and it is certainly an aggravation of the injury lybelled that the Pursuer was Provost, and the Pannell has no interest to quarrell his not taking of the Test, and the same belongs only to publick authority.

Duplys Mr. Da. ffalconer that the Defence stands relevant notwithstanding of the Reply, seeing by the Act of Parl. on which the Defence is founded its most evident that before a magistrate exerce he should take the Declaration, and his entering before is rather a crime than a ground to sustain this Dittay at his instance, and he cannot be able to instruct that ever he took the Declaration, and albeit he should offer now to take it, yet that being *ex post facto*, cannot be drawn back to the date of his admission to inferr a Crime, and to that part of the Reply bearing that beating of any of the subjects is a Crime, its duplyed that the Dittay is opponed wherein nothing is lybelled but the beating of a Magistrate founded on an express Act of Parliament and cannot insist on a Crime not lybelled. And whereas the Reply bears, that the Declaration was never offered to him, its duplyed that he ought to have taken it without being offered and then have offered it to the Baillies and other Magistrates, he being the Provost and President of the Court, who first should do his own duty and then see duty done by others.

Carnagie for beating the Provost of Abberbrothick.

Sir Geo. M^cKenzie farther adds to this Duply, that the Lybell being conceived for the beating of a Provost and founded on a specifick Law as the *medium concludendi* is every way different from the medium of common beating, it can never be changed, ffor then a person who is pursued for one crime

may be insisted against for another, which cannot be for Criminall Lybells being execute by giving of full Coppys to the end the Defender may prepare himself, this Defender finding himself innocent of the Crime in the Coppy given him, was not obliged to prepare himself ffor the Defence of any other different from the Crime in the Coppy he received, and the Pursuer may impute to himself that when he lybelled beating of a Magistrate, he did not also lybell common beating, and if Pursuers should have the liberty to change the nature of their Indytements at the time they are called, then Defenders would be prejudged of their exculpations which they never raise but conform to the Lybells delivered to them, and would also be prejudged of bringing with them the Documents that may defend them against the new Crime.

And as to the pretence that his being cloathed with authority is at least an aggravation, the same ought to be repelled, because he had no authority for the reason forsaid.

Triplys Sir Geo: Lockhart for the Pursuer, that he oppones his Reply bearing that the Pursuer exerced as Provost, and the fact lybelled being of its own nature unlawfull to all persons, his being a Provost is but as *qualitas aggravante*, and it is beyond all doubt that Murder, Mutilation or Injury done to any person not in authority is the same species of Crimes but only receives the aggravation of the quality in the one which is not in the other, and Law and Lawyers are most clear that *qua* Crime as Lybelled *cum qualitate aggravante* which does not diversify the nature of the Crime, the not probation of the quality does not liberate from the Crime as in Murder lybelled to be committed under trust, and only the murder but not the Trust proven, and also Murder upon a person of a near relation and the quality of the relation proven, but not the nearness of it, and in criminall Lybells a *nuda narratio facti* being lybelled is sufficient, and there is neither necessity of a proposition or conclusion, and therefore if the subsumption of the Dittay contain a narration of the ffact be taken *per se*, it makes a crime and receives an aggravation from the quality of the person that did officiate as Provost and was publickly owned as such, and his not taking of the Declaration is but a meer ommission as said is and he was yet content to take it.

Sir Geo: M^c^kenzie for the Pannell 2° *et separatim* alledges that the Pannell cannot be conveened upon the Act of Parliament lybelled for beating of a Magistrate in the exercise of his Government because he was not in the exercise of his Government nor in the place at the time where he should exercise it, but on the contrary he was in a Tavern where he was to be looked on as Drunkard and not as Provost, and so not being in the exercise of his Government, the Act of Parliament takes no place which runs only against those that injures or contemns Magistrates in the exercise of his office and 3° as to the injurious words lybelled alleges (denying the same) that the Pursuer never being a Magistrate nor in the actuall exercise of his office, but both Pursuer and Defender being *versantes in illicito* (viz. at drinking ffor I suppose this must be the thing meant) the words can but at most inferr a scandall proper to be cognosced by the Commissiarys.

Replys Sir George Lockhart to these two last Defences, that the violence and opprobrious words lybelled were committed in the Baillies house where the Provost then was in the actuall exercise of his office as Provost, and by the which quality of actuall exercise, *crescit injuria* and which injury may be either pursued *civiliter* before the Commissarys *ad Palinodium vel criminaliter ad pœnam extraordinariam*, and its proper to be pursued criminally in this case where there was *injuria realis* as beating and violence joined with the opprobrious words and verball injury, and the Pursuer insists in this Lybell complexly as founded on both.

Interloqr. The Lords Commissioners of Justiciary finds the Lybell containing beating of the Pursuer, John Aikman relevant in it self without relation to any aggravation as Provost,[1] and admitts the same to the knowledge of an Assize, and they give no Interloquitor upon any other point of the Dispute as whether he could be a Magistrate before he took the Declaration, nor do they sustain the shaking of him by the breast nor the injurious words for a crime.

Proof. The Pursuer for probation adduces 4 Witnesses and there being an objection proponed against James Martine one of the

[1] Sir George Mackenzie, in treating of libels, title xxi., states, in referring to this case, that this seems a hard decision.—W.

four, that there was mutuall Lawburrows betwixt him and the Pannell, the Objection is repelled in respect it was but for a Civil Cause and that the Witness should be purged of partiall Counsell.

The Assize all in one voice fand the Pannell cleaned and not guilty of the beating and striking of the Pursuer and shaking him by the breast, and the injurious words are proven, but that's not sustained by the Interloq^{r}. W^{m} Binnie, Jas. Graham and John Scott, merch^{ts} and John Brown of Gorgie Mill and Walter Scott, Glazier absent assizers, ammerciate, the Pursuer decerned in the Expences of the Witnesses. Verdict.

Eod. Die.

Paul fferles in Pitcaffie and W^{m} Bissett, merch^{t} in Aberdeen, against John Watson in Grayshillock, John Seton at the Mill of Menie, and others, for the Crime of Theft and Oppression, continued to the last of ffeb. next, and William Seton sometime of Rannishtown and Alex^{r} Ramsay, Pickieman at the Mill of Menies, declared fugitives.

Edinb. 25 Nov^{r} 1672.

John Craig of Cult, formerly convict of Adultery continued.

Eodem Die.

James Gordon in Dindurus ag^{t} Geo. Grant of Kirkdells *et e contra* for Theft and Receipt of Theft, continued.

Eodem Die.

Donald ffraser of Drummond and Mr. Geo: Gray, Writer in Edinb^{r} his attester unlawed for not reporting criminall Letters ffraser ag. ffrasers.

Edinb^{r} 2d Dec^{r} 1672. Colington, Strathurd, Castlehill and Newbyth present.

George Grant of Kirkdells, John Dow, Coskath, John Riach, his servants, indyted for the breaking open of Jas. Gordon in Dindurus his sheep cott, it being lock'd fast, and stealling and away taking theftuously out of the same 49 head of old sheep, ews and wethers all pertaining to the s^{d} James Gordon,

Pursuer, and to John and Robert Gordons his sons, and that under cloud of night, upon the 3d of March last. All which the said Geo. Grant caused burn with his iron and tarr with his mark, and when 8 of these sheep had strayed back again from the Glen of Kirkdells to the Pursuer's cott-door, the said John Dow came to the said door and tooke them away again upon the said 4 of July last. As also the said Geo. Grant is indyted for contraveening the said 21 Act Parl. 1, Ja. 6, anent Theft and Receipt of Theft in that part thereof where it is statute and ordained that whatsoever person or persons receipted, fortified, mantained or gave meat, harbour or assistance to any Thieves in their theftuous stealling, either in their coming thereto, or their passing therefrom at any time coming, or intercommuned or tristed with them without Licence of the keeper of the country where the Thief remained, the Receipter Mantainer or ffortifier or Intercommuner with such persons shall be called att particular Diets as airt and part of the said Theft, notwithstanding whereof the said Geo. Grant did not only receipt, mantain, supply and keep correspondence with the said John Dow, Coskath, and John Riach, two notorious Thieves, his sheepherds past and present, before the committing of the forsaid Theft, but likewise since and continually since syne, and that he harbours them and gives them burn irons for the better carrying on of their Theft and has receipt the forsaid stollen sheep among his own and owned them to be his.

Gordon agt. Grant of Kirkdells for Theft.

e contra. George and James Gordons, sons to James Gordon in Dundurus indyted and accused for stealling and receipting or being art and part of stealling and receipting from Geo. Grant upon the 3d of July 1672 or ane or other of the days of the said month, of 24 Wedders, 16 ewes, 13 Lambs, all alledged stollen from the said Geo. his fflock, where they pastured at Lochtermore of Glengaldie about the time forsaid, and was found in the custody and possession of the said James Gordon and his sons.

Sir Geo. Lockhart for the Pannells George and Jas Gordons alledges that they repeat and oppone their Defence contained in their exculpation, mentioning that on the
day of March, their sheep cott being broken, 49 head of sheep belonging to them being stollen furth thereof, and they

having made diligent search therefore both by Proclamation at severall parish kirks and otherwise, but having no nottice thereof. True it is that upon the 8th day of July last 8 of the said sheep stollen from the said Pannells in manner forsaid returned to their cott having the mark and burn iron of the said George Grant upon the foreheads and within a few days thereafter were owned by him to be of his fflock notwithstanding by severall famous Witnesses they then made it appear and as yet will that the said sheep properly belonged to them and were stollen in manner forsaid, at least that these 8 sheep with them was a part of the same sheep which the Pannells wanted formerly and were in their possession, and that they had searched for them by Proclamation and otherwise as said is, and that these 8 sheep quarrelled did voluntarily return to their own cott as their old haunt as sheep uses to do when they either stray or are stollen.

Sir Robert Sinclair for the Pannells Geo. Grant and others Answers that the Defence ought to be repelled being contrary to the Pursuer's Lybell whereby he offered him to prove that the 8 sheep ment[d] in the Defence which are alledged to have been the said James Gordon his sheep that were stollen or strayed in March last q[r] the Pursuer has proper sheep, and the time when they were deprehended in the said Jas. Gordon his possession in a house with his own sheep, they were not only burned with the Pursuer's own burn iron and tarred with his tarr, but likewise in fortification of the said Lybell, offers to prove that the said Sheep were in the pursuer's possession severall months, weeks or days before the month of March as said is, and were constantly in his possession untill the time lybelled till the latter end of June or beginning of July, being deprehended in the Pannell's possession two or three days after the stealling or away taking thereof and consequently could not be the individual sheep mentioned in the Defence. Likeas the time lybelled when they were deprehended in the said Jas. Gordon his possession, he did so far confess and acknowledge the said sheep to belong to the Pursuer and were none of his, that he would voluntarily deliver the same to the Pursuer's serv[t] John Dow, Coskath, and permitted him peaceably to take the same away the length of Cusack in Rothes, two or

Grant agt. Gordon and *e contra* for sheep stealling.

8 miles distant from Jas. Gordon's house, and thereafter he and the saids Pannells, or one or other of them, or their servants, did overlye and overtake the said John Dow, Coskath, and brought the said sheep back, and still detains the same.

Replys Sir Geo. M^c^kenzie for the Pannells Gordons, that the Exculpation is relevantly founded, notwithstanding of the Indytement, ffor the Lybell being that the Pannell stole, its a most relevant reason of exculpation to alledge that the sheep were the Pannells own sheep, and so he could not steall them, and this being in effect the Defence, they must be preferred in improbation before Geo. Grant offering to prove the sheep to belong to him, especially seeing the Pannells did proclaim the want of such sheep and that George Grant did thereafter put his burn iron upon them.

Sir Geo. Lockhart declares, he insists agt. Geo. Grant and his servants on his indytement upon the terms of Theft, Receipt of Theft, airt and part.

The Lords Commissioners of Justiciary finds both the Dittays relevant and ordains them to pass to the knowledge of an Assize.

I remember it was told me when the Process was insisted in that the Commissioners perceiving both parties most positive in offering to prove the property of the said goods and the two Lybells were contrary to other each of them expresly lybelling the property and were raised of purpose that both of them might have the probation of the property, therefore the Justices were necessitate to give their Interloq^r^ in the terms forsaid allowing each of them to prove the Dittay tho they be contrary to others in that point of the property of the Sheep.

As to the Probation it is by witnesses on both sides and both of them proves the property of the 8 sheep so clearly that the Assize were reduced to as great difficulty as the Judges and therefore they were forced to find the Gordons free of the Indytement raised by George Grant against them in regard they had clearly proven that the 8 sheep were their own, and this they did by an unanimous vote. And again all of them (except Jas.

Verdict.

Riddell) fand in the other Action against George Grant that the said Geo. Grant had proven the said 8 sheep to belong to him, and therefore as they had assoillied the Gordons from George's Indytement, they assoillied George from their Indytement, and his two servants John Dow Cossack and John Riach, whereupon both parties took Instruments.

Eodem Die.

John Gordon of Artlach against James M^c^Alaster for Theft, continued.

Sir Wm. Graham of Gartmuir agt. John Graham of Duchry and his sons and others for Deforcement, continued, and Duchar's two daughters declared fugitives.

Eodem Die.

The doom against Mr. Arch^d^ Beith and M^c^Gibbon the pronouncing thereof continued.

Eodem Die.

Mr. David Gordon of Auchynany and John Erskine, messenger, declared fugitives for not compearing to receive Sentence in the Action of Wrongous Imprisonment pursued against them by the Laird of Culter and Sir John Gordon of Park, and Charles Erskine of Alva, their Cautioners are unlawed.

Edinb. 8. 9 and 16 Decembr. 1672.

Gartmore agt. Graham of Deuchrie again continued.

John Dow, Cossock, indited at the instance of the procurator ffiscal of the sherriffdom of Murray for Theft, advocate and deserted.

Doom against John Craig of Cult for Adultery, continued.

Peter Dunbar of Balnaferrie against Peter Tilloch, brother to Tannachie for Theft, continued, and again upon the 16 of the said month continued till the next circuit.

The said 16th day the Sentence against Mr. Archibald Beith farder continued to the 13 Janry. next.

Edinbr. 20 and 23 Decembr. 1672.

Jean Campbell against John Campbell of Lareek, and others, for a Rape, continued, and Sir William Scott of Ardross and Collonel William Borthwick against severall maltmen for taking exorbitant advantage upon Malt contrary to a penal Statute, also continued to the 13 January next.

This was a Gift upon an exolet act.

Edinbr. 6 January 1673.

The Relict children and nearest of kin of Andrew Liddell in Cringate, Tenant to the Viscount of Kilsyth against diverse persons for the slaughter of the said Andrew Liddell. The Diet is deserted *simpliciter* as to John Buchanan of Auchmore, one of the Defenders, he having compeared and being past frae and ordained that no new Letters be direct furth against him in any time coming, and John Milnab in Phinnickhaugh and diverse other defenders are declared fugitives, the Pursuer decerned to pay the witnesses charges.

Eod. Die.

Hugh ffraser, younger in Easterleid, John and Alexander ffrasers, his brethren, declared fugitives for the blooding and wounding of Hugh ffraser, younger son to James ffraser in Meiklegarb as they who found caution in the Books of Adjournall to compear, and the Pursuer's cautioner unlawed for not insisting.

The same day compeared Mr. William Moneypenny,[1] advocate and produced a substitution from his Majesties advocate to compear in the forsaid business, which is here recorded and is the first I have seen of this kind produced in writting, therefore I insert here the copy of it. These are to give Warrand to Mr. William Moneypenny, advocate, to compear for publick interest in the Criminal pursuit at the instance of Hugh ffraser and me for his Majesties interest against . . . ffrasers for beating and wounding of the said Hugh ffraser, to be held the 6th of Janry. 1673. In witness whereof I have subscribed

[1] Son of Sir James Monypenny of Pitmillie; admitted advocate 20th February 1669.

thir presents (written by the said Mr. William Moneypenny att Edinbr. the 6 Janry. 1673, *sic subr.* John Nisbet).

Edinb. 13 January 1673.

The pronouncing of the Sentence against Beith and M^cGibbon, farder continued to the last Monday of ffebry next.

Sir William Scott of Ardross and Collonel Borthwick against the maltmen continued again but Jasper Johnstone past frae.

Edinbr. 20 Janry. 1673.

The same Action against the Maltmen continued again.

Sir William Graham of Gartmore and his Messenger against Graham of Dewchrie for Deforcement, deserted.

Walter Ogilvie of Muiriehill against Gordon of Blairmad, for beating and wounding, deserted. This Walter Ogilvie in the petition given in by one of the witnesses for his expences is designed Servitor to the Lord Bamff, and the cause of this quarrel was a prior quarrel betwixt the Lord Bamff and a brother of the said Harys, who was killed by the Lord Bamff and his servants in self defence, there is 16*s* modified to this witness *per diem* being a horseman for eleven days.

This day their being a petition presented to the Lords Commissioners of Justitiary by Bessie Martin, spouse to James Duff in Leith, complaining that she was incarcerate in the Tolbooth of Leith by warrand of the Baillies of Leith for beating and wounding of Richard Tweedie there, whereof he is alledged to have died, and howbeit she be innocent of the said crime, and is able to make it appear that he died of another disease then of the strokes given by her, as is evident by a Testificate produced, yet neither will the Baillies insist against her nor sett her at liberty upon Caution offered, but has transported her to the Thiefs hole in Edinbr. where she lies in a miserable condition. Therefore craving that the Lords would put her to liberty upon Caution, which desire they grant in respect none compears to insist.

Edinbr. 27 January 1673.

The Doom against John Craig for Adultery being formerly

continued, he produces a Remission under the Great Seal, therefore the Diet is deserted.

Edinbr. 3 ffebry 1673.

Compears Lord George Bamff[1] and made faith that he, his men, tenants and servants dreaded bodily harm and oppression of Hary Gordon of Blairmad, and craved that he might find Caution of Lawburrows acted in the books of Adjournall, which desire the Lords granted.

Advocatus agt. William ffraser *alias* M^cGillie Callum, for Slaughter, continued.

Sir Allan M^cLean of Deuart and John M^cDougall, his tenant, against Donald Cameron, son to the Tutor of Lochzell, for Theft, declared fugitive.

Edinb. 10 ffebry. 1673. Present in the Court the Justice Generall and 5 Commissioners of Justitiary.

Walter Ogilvie of Muiriehill agt. Gordon of Blairmad, for beating and wounding, continued to this day eight days.

Mr. William Nimmo against Commissar ffleeming, for Perjury, continued to the same day.

Eod. Die.

ffleeming agt. Spalding of Ashintully for Slaughter.

The King's Advocate and John and Alexander Fleemings against Andrew Spalding of Ashintully, David Spalding his brother german and James Shaw, servitor to the said Andrew, indited and accused at the instance of the said Advocate and the said ffleemings his informers, for the slaughter of Andrew ffleeming, merchant in Dundee, by lying in wait for him in March 1664 as he was coming from Kirkmichell to Edinbr., and there shooting him with a gun loadned with ball through the body, and thereafter wounding him with swords and durks in the head and other places of his body, and sua was cruelly murdered and killed by the forenamed persons. And they and ilk ane of them are actors art and part thereof, which being found by an Assise they ought to be punished in their persons and goods.

[1] George, third lord; succeeded 1668; died 1713.

The Lords Justice Generall and Commissioners of Justiciary ffinds the Dittay relevant, and ordains the same to pass to the knowledge of an Assise.

The Assise, which consisted of eleven Barons and four Merchants, being sworn and no objection to the contrary, the pursuers produced against the said James Shaw his own Confession made by him in answer to several Judicial Interrogators, whereby he declares and acknowledges that he was at the Murder of the said Andrew ffleming and declares that David Spalding was the sole actor and killed the Defunct with a Durk, that none other were present at the Murder but they two, and that immediately after the said James returned to Ashintullie's house of Stratherbie. That he saw Ashintullie next morning but sayed nothing to him nor had warrand from him for the Murder. Declared that the occasion of the said James Shaw and David Spalding going to meet the Defunct was to take some paper from him as David said. Denyes that ever he confessed to W^m^ Bettie that he was the murderer, as also denyes that he drew his Sword, Knife or Durk, or wounded the Defunct. *Sic sub^r^* Athole *I.p.d.*

Sicklike the Pursuer for probation against Andrew and David Spalding adduced severall Witnesses, and first John Rattray of Borland.

Letters of Exculpation for proving the objections agt. the Witnesses.

Sir Geo. M^c^kenzie for these two Pannells Andrew and David Spaldings, produced Letters of Exculpation for proving their Defence of Alibi and also Letters of Diligence for citing Witnesses for proving their exceptions against the Witnesses adduced for the Pursuer duely execute and indorsed, and thereupon alledged that the said John Rattray could not be received as a Witness in this Action because he offered good Deed to James Shaw, Pannell, and to get him an Absolvitor providing he would fix the Guilt of fflemings Murder upon Ashintullie.

The Lo. Commissioners of Justiciary allows a joint probation as to both parties and after examination of severall witnesses anent the objection made against John Rattray, and the Interrogators given in thereanent, viz. whether John Rattray had feed at Ashintullie or not, and the same being sufficiently proven by John Rattray's words and deeds, the

Lords Justice Generall and Commissioners of Justiciary by another Interloq^r^ ffand the objection relevant and proven against John Rattray, and found that he could not be a witness agt. Ashintullie, and therefore repelled this Witness as to him, but sustained him as to Ashintullie's Brother, in regard nothing proven of ffeed or hatred betwixt them two.

The Pursuers for furder probation adduced Alex^r^ Stewart.

Sir Geo. M^c^kenzie for the Pannell alledges that this Alexander Stewart cannot be received as a Witness, because he offered to prove by famous Witnesses that John Rattray of Borland, his master, had hired and threatned him to make a lie and to fix the guilt of fflemings murder on Ashintullie and his Brother, and if he should do otherwise, he could not be able to keep the countrey, which objection he proves sufficiently by John Bruce, elder, in Balnabrich and John Bruce, younger thereof, who depone that Alex^r^ Stewart told them he was so threatned by John Rattray of Borland at the House of Tullibardine that John promised to depone before him, and that he when they asked the said Stewart where he had been, he told them he had been in Tullibardine and he wished he had been in ffrance when he was there, and gave that threatning for the reason of his wish.

The Lo. Justice Generall and Commissioners of Justiciary ffinds this objection also relevant and proven, and therefore repelled this Witness both as to Ashintullie and his Brother.

The Pursuers for a 3^d^ Witness adduced Alexander Rattray in Dalgairie, against whom Sir Geo. M^c^kenzie objects that he could not be a Witness because there were *Inimicitiæ capitales* betwixt him and the Pannells in swa far as he has often said that he wished to wash his hands in the heart blood of these two Pannells, viz. Ashintullie and his Brother. This objection is also proven by John M^c^intosh in Belchraigie and Alex^r^ M^c^duff in Ashintullie.

The Lo: Justice Generall and Commiss^rs^ of Justiciary ffand this objection also relevant and proven and therefore rejected this witness.

The Pursuers thereafter adduced Robert Murray in Tullich a 4^th^ witness, for proving the Indytement.

Sir George M^c^kenzie for the Pannells Spalding alledged this

Witness could not be received because he offered to prove that he bure deadly feed against these Pannells in so far as he had lyen in wait severall times to kill them with a gun. This objection is proven sufficiently by Andrew Johnston in Milltown of ffernett, Andrew Spalding in Milltown Weirie, Leonard M^{c}nab in Wearie and Andrew Rattray in Tulliechurran. The first two proves that they both saw him[1] ly in wait and saw the gun presented and snapped. The third is conformis except that he heard not the gun snapp, and the 4th depones, that he heard commission given by Dalzullian's ffriends to ly in wait for Ashintullie, of the which ffriends Robert Murray was one, and thinks that the said Robert undertook the same himself, and farther depones that Robert Murray was in company with Dalzullian at another time when he pursued Ashintullie.

The Justice Generall and Commissioners of Justiciary fand the objections against this Witness also relevant and proven and therefore repelled him both to Ashintullie and his Brother.

Thereafter there are other 4 witnesses adduced, viz. W^{m} Bettie, Alexander Robertson, the said John Rattray of Borland and Andrew Rattray of Tilliechurran, who are all examined upon the whole matter, except John Rattray, who is only examined to James Shaw and Andrew Spalding, because he was formerly rejected as to Ashintullie himself, but the most that they prove is, that these two enquired after the motion of the Defunct that day he was killed and that they were repute to be the killers, but William Bettie depones, that Shaw desired the said W^{m} to shoot the Defunct through the hole of a house. ffleming agt. Spalding for Slaughter.

The Assize fand that by the Depositions of the Witnesses, there was not so much as *fama clamosa* proven against Ashintullie and therefore assoillied him, and by the second vote fand that the Depositions did not prove against David Spalding that he was guilty, and therefore assoillied him. And by the 3^{d} Vote the greatest number of the Assizers fand James Shaw guilty as accessory, airt and part of the Murder in regard that by his Judiciall Confession he acknowledged he was present at Verdict.

[1] 'the said Robert Murray' in Adv. MS.

the Murder, and in respect of other presumptions, these other Presumptions arises from the four last Depositions, ffor W^m^ Bettie depones that he dealt with him to shoot the Defunct through the hole of a house, and that he enquired after the motion of the Defunct and said he had a Letter to give him, which was a concealling of his design, and did not positively deny the Murder when W^m^ Bettie asked him about it, but said if he had done it would never be known and that he changed his habit immediately before the Slaughter, and that by common report he and David Spalding were looked on as the actors, and the other 3 Witnesses depone upon the change of habite and common fame.

The Lords Commissioners of Justiciary continues the pronouncing of Doom against James Shaw till tomorrow, and from the morrow they continue it till the 17th instant, and from thence to the 24th instant and then to the 4th March next, att which time he is adjudged to be hanged in the Grass Markett of Edinbr. upon the 11th Aprile next thereafter.

Att the time of Triall of this Cause one Donald Campbell,[1] servitor to the Earl of Argyle, was dilated for injurious expressions against the Justice Generall, and imprisoned.

Edinbr. 11 ffeb. 1673. Colington, Strathurd, Castlehill, Newbyth and Craigie, present.

Mr. W^m^ Nimmo against Sir W^m^ ffleming for Perjury, continued. As also Walter Ogilvy of Muirichill agt. Gordon of Blairmad.

17th feb. 1673.

Straiton minister agt. Doig for Defamation.

Mr. Andrew Straitton,[2] minister at ffinhaven agt. David Doig of Reswallow, indyted and accused for defaming and calumniating the Pursuer, being a Minister, to wrong him and his credite and office or ffunction of ministry by saying in the hearing of many persons on the 25 ffeb. 1672 that the said Mr. Andrew was a perjured man and had mansworn himself in an Action pursued at the instance of the said David Doig against him,

[1] See for his trial under date 24th February 1673.

[2] Ordained and appointed minister of Finhaven—now Oathlaw—in 1659.

and being challenged by one of the hearers for saying so, he did reiterate the same, and concludes for Reparation of his ffame and Reputation, and specially because none of his Parishioners will hear him untill the Calumny be taken off.

Sir Robert Sinclair for the Pannell, Alledges (no ways acknowledging the words lybelled) that he cannot pass to the knowledge of an Assize for the same, because calumnious words are not the ground of a Criminall Dittay, but the ordinary redress is by the Consistoriall Judge or Kirk Session for repairing the ffame and reputation (except where the Calumnys are against the King's Majesty), because words are frequently uttered *sine animo injuriandi*, and it was so in this case, ffor if any injurious words were uttered, it was *in calore iracundiæ* and upon provocation given by the Minister and others on his account, ffor the Pannell having intented a Pursuite against the Minister for payment of a debt due by the Minister's Bond and the Minister having alledged that the Pannell allowed the debt to be paid to another person, and referring the same to the Pannell's oath, the Pannell deferred it back again to the oath of the Minister, who having sworn negative and being assoillied his Procurators insulted upon the Pannell and provocked him to utter any words that he spoke.

Replys Sir Geo: Mckenzie that in law *vita et fama æquiparantur*, and it is specially so in the case of a Minister not only as to himself but as to the Common Wealth, and it will be a greater crime to call my Lord Chancellor a cheat, and the Abp. perjured, than the stealling of a horse. And as to the pretence that the Commissarys are the only proper Judges, the same ought to be repelled, because *injuria sive sit verbalis sive realis* is a crime by the Common Law and Law of Nations and *in utraque oritur actio civilis et criminalis*, and the Commissary be Judge *in actione civile ubi agitur ad Palinodium et estimationem litis*, yet he is not Judge in the Criminall Action *ad vindictam*, the Commissary's jurisdiction being but *Episcopalis audientia*, and seeing the Common Law has allowed Criminall Pursuitts in this case and that our law does not restrict it, it follows that by our law a criminall Pursuit may be sustained, especially seeing that wee have Criminall punishments such as condemning to the Pillory

and boring of the Tongue, which cannot be inflicted by Commissarys. And seeing the injury is done to a Minister whereby his preaching becomes ineffectuall, and as to that part of the Defence that the words were uttered *in calore iracundiæ* and *sine animo injuriandi*, the same is *in causa* but is not a ground for declining of the Court, and as *Lybellus famosus* would be a ground of Dittay, so ought injurious words to be, because *libellus famosus* is but species *injuriæ verbalis*.

Duplys Sir Robert Sinclair, that there is a great difference betwixt persons invested with publick authority such as Privy Counsellors and Officers of State and persons of inferior degree such as the Pursuer is, and betwixt injurious words publickly uttered before a Judge, before a Court, and words privately uttered among parties. As also there is a difference betwixt *ffamosus libellus* and *verbalis injuria*, because that which is put in write is deliberately done and is a more attrocious crime, and wee have express law against it, but the subject of this debate is nothing but words uttered among private persons and not in face of Judgement.

The Lords Commissioners of Justiciary having considered the Alledgiance, Reply and Duply, ffand that this Cause is not of that nature as that needs to be discust before this Supream Court and therefore deserts the Diet and leaves the Pursuer to pursue before the Inferior Judge competent.

Edinbr. 24 ffeb. 1673. the Justice Generall, Strathurd, Castlehill, Newbyth and Craigie, present.

Walter Ogilvie agt. Gordon of Blairmad, continued to this day 8 days.

Eod. Die.

John Watson in Grayshillock and John Seton at the Mill of Meanie, Thomas Greig of Loanhead, John Auld and Pat. Clark in Newburgh, indyted and accused by virtue of Letters raised at the instance of Paul fferleir in Pittscoff and W^m^ Bisset, merchant in Aberdeen, and the King's Advocate for his interest, for Convocation of the Lieges in arms and breach of Lawburrows, in swa far as, they and their associates being

armed with all invasive weapons, did on the March 1672 come to the Mill of ffoveran where the said Paul fferlier had laid down severall sacks of corn to be ground at the said Mill, and carryed away 5 of the sacks without consent of the owner, and disposed upon them at their own houses (notwithstanding of standing Lawburrows betwixt the parties), and that by way of Theft and stouthrief.

Mr. Alex^{r} Seton for the Pannell, John Watson, Alledges the Pursuer ought to subscrive the Indytement because the said John is a landed man and Theft and Robbery in a landed man is treason.

Replys Sir Geo. Lockhart for the Pursuer, he is content to restrict his Indytement to a Riot and Oppression, and as he lybells Southrief, so he lybells masterfull oppression, and the Pursuer is not holden by Act of Parliament to subscrive his Indytement.

Mr. Alex^{r} Seton protests that if the Pursuer succumb he may be liable to the pain of Treason conform to the Act of Parliament, and Sir Geo. Lockhart protests in the contrair.

Mr. Alex^{r} Seton for the Pannell John Watson further alledges that he ought not to pass to the knowledge of an Assize for taking away of the Corns lybelled, because if he did take it, which is denyed, it was by virtue of a sufficient Title, ffor he being Heretor of the Lands of Pitscoff, and Paul fferlier, the Pursuer, being his Tenant, he seized upon the Corns for his Ground Duty by virtue of his right of Hypothecation.

And as to John Seton and Pat. Clark, they ought to be assoillied, because any accession they had was as two of the Constables of the place where they lived, ffor seeing the appearance of a Riot among these parties they were obliged to be there to prevent it, and so were *in executione actus liciti* and in their duty, and produces a Testificate under the hand of the Justices of Peace of the Shire of Abd̄n. to verify their Constables.

Replys Sir Andrew Birnie that no regard ought to be had to the Hypothecation in respect that long before the victuall lybelled was seized upon, John Watson was denuded of his right of the Lands of Pitscoff in favours of W^{m} Bissett, one

of the Pursuers by infeftment thereof under the Great Seall, who thereupon obtained Decreet of Maills and Duties against the Tenant Paul fferler and against the said Jo. Watson, and Clara Brown his spouse, before the Sherriff of Abd^{n} for the cropts 1668, 1669, 1670, and 1671, dated 4 Oct^{r} 1671. And also on the 7th of June 1671 the said W^{m} Bissett obtained a Decreet of Removing ag^{t} the said John Watson and his Spouse, and both which Decreets bears production of Bissett's Seasine of the forsaids Lands, and there being two Suspensions of Double Poinding raised by Paul fferler against Bissett and Watson, Bissett is preferred in both, which Decreets are dated in Janry. and ffeb. 1672, and are all now produced, and wherein also Bissett is preferred to the sons of John Watson and the Letters found orderly proceeded at his instance agt. Watsons and the Tenant.

Bissett agt. Watson, etc, convict of a Riot and fined.

And as to the Defence proponed for the Constables viz. that they were Constables *non relevat* except it be made appear that they were called to be there, and that they interposed to hinder the unwarrantable deed, but so far were they from offering to hinder it that they acted as accomplices with the other Pannells. Also it is replied, that the Tack sett by Watson to the Tenant, stood suspended.

Duplys Seton, that the Alledgiance stands relevant notwithstanding of the Reply because any Infeftment the Pursuer has is upon a Comprising only, whereof the Legall is not yet expired, and as to the Decreets of Maills and Duties and the Removing, they stood suspended the time of the Intromission lybelled. And if there be any Decreet of Suspension (which the Pannells nor their Procurators has not seen) its purchased after the Intromission lybelled, so that the Pannell was still *in bona fide* to intromett by virtue of his right, and as to that part of the Reply, that the Tack sett by Watson to the Tenant stood suspended, the same is of no weight, nor could not hinder Watson to intromett with the Victuall lybelled for his own security, because the Suspension could not loose his Right of Hypothecation. And he was not obliged to rely upon the ffaith of his Tenant or the Tenants Cautioner in the Suspension, but might very well seize upon and secure the Victuall lybelled untill the event of the Plea, *Quia tutius est*

incumbere rei quam personæ. And as to the two Constables, Oppones the Defence and denyes their accession to any Riot.

The Lords Commissioners of Justiciary Repells the Defence and Duply in respect of the Reply, and ordained the same to pass to the knowledge of an Assize, and justly, ffor the Decreets of Suspension produced to instruct the Reply are dated in January and ffeb. 1672 and so is before the Seizure of the Victuall, which is lybelled to have been in March thereafter.

The Assize by plurality of Voices finds the Pannells John Watson and John Auld Guilty of a Riot, but nothing is proven against the other Defenders. Verdict.

Whereupon the Commissioners of Justiciary continued the pronouncing of Doom to the 4th of March next and ordained the said John Watson and John Auld to be carried to Prison there to remain till that time, and at the said day, the said John Watson is fined in 400 Ms. for the Riot and for the price of the Victuall, and John Auld is fined in the sum of 100 Ms. and these sums ordained to be paid to W^{m} Nisbett, and Letters of Horning to be direct for the same.

James Stewart in Pett for the Slaughter of Alexander Gown, declared fugitive, and Alex^{r} Gordon of Kincraigie, his Cautioner unlawed.

Eod. Die.

Donald Campbell, servitor to the Earl of Argyle, being brought furth of the Tolbooth of Edinbr. and interrogate anent some expressions he had spoke concerning the Earl of Athol, Lord Justice Generall, declared that he being standing in the Parl^{t} Closs beside some Gentlemen of the Life Guard and others whom he heard speaking anent the Triall of James Shaw, hearing them say that Shaw would be condemned, the said Donald Campbell, the Declarant, said he would not be condemned, ffor he had heard two Highlanders whom he conceived to belong to Ashintullie, say, that my Lord Athol had hired James Shaw to lay the guilt on Ashintully and his Brother, and to confess himself accessory thereto, and had promised to absolve Shaw, whereupon Mathew Murray, Writer in Edinburgh, said to the Declarant, that he

Don. Campbell servr to the E. Argyle sentenced to have his tongue bored for injurious speeches agt. E. Athol Just: Genll.

could not be answerable for such discourses, whereupon the Declarant answered, he had heard the same from as good persons as the Earl of Athol himself, but declared that this expression fell from him rashly and indiscreetly and that he had no ground under Heaven for speaking thereof, and remembers no more. *Sic Sub*^{r} Don. Campbell.

There being three witnesses examined on this point, viz. Mathew Murray, William Seton, one of the Gentlemen of his Majesties Guard, and George ffleming, taylor, they all three deponed that Don. Campbell said that James Shaw was in no hazard, that my Lord Athol would procure him a Remission, and being told by the Witnesses it would be difficult, he answered, I warrand you he will do it, and that he had heard men say, Lord Athol had hired James Shaw of purpose to confess that fact agt. Ashintully and his brother to get the Deed fixed on them and get their lives, and that he heard as good men as my Lord Athol himself speak it.

Sentence. His sentence is to be taken upon the 24th instant to the Cockstool of Edinb^{r} and there to stand betwixt two and four hours in the afternoon, with a paper on his breast, carrying his fault, and make publick confession thereof, and to have his tongue bored by the hand of the Hangman, and thereafter to be carried to prison, therein to remain during the saids Lo: their pleasure. But immediately after the pronouncing of the Sentence, the Lord Justice Generall declares his willingness to

Pardoned. pardon his offence in so far as concerns himself, and interposed with the Lords Commissioners of Justiciary to pardon the same in so far as the Court was concerned by the injury done to one of their members, intreating they will sett him at liberty, with which desire the Commissioners complys, and ordains a Warrand to be drawn for setting him at liberty, which was immediatly drawn and subscribed by the Justice Generall. This proceeded upon a humble acknowledgement contained in a Petition given in by the said Donald Campbell to the Court, submitting himself to the Justice Generall before the Sentence was pronounced, offering to depone that he spoke rashly of himself, without any previous information and therefore craving that in respect of his ingenuity the Justice Generall and Lords of Justiciary would commiserate

his condition, after reading of which Petition, the Lo: thought fitt to pronounce the Sentence for example and immediately to pardon him *ut supra.*

Observe here, that albeit upon the 17th of this instant which is the Diet immediately preceeding this the Lo: in the case of Mr. Andrew Straitton, minister, thought it not proper for them to cognosce on a Verball Injury, but did remitt it to the Judge Ordinary. Yet here they cognosce upon a Verball Injury done to the Justice Generall, a Nobleman and Privy Counsellor and that summarily without a Lybell, upon a Verball Complaint, because he was reflected on in the Justice of his Office, in which case even that Debate does acknowledge they might cognosce.

Edinbr. 3d March 1673, Strathurd, Castlehill, Newbyth, and Craigie, p^{t} Newbyth Preses.

Ogilvy agt. Gordon, beating and wounding, cleansed.

The said day Hary Gordon of Blairmad, indyted at the instance of Walter Ogilvie of Muiriehall, servitor to the Lord Bamff, and the King's Advocate for his interest, that albeit invading and assaulting of the leiges be crimes of a high nature and punishable by the law, nevertheless the said Hary Gordon, having conceived a cruel hatred against the late Lord Bamff and the present Lord Bamff, his son, upon pretence that George Buchan, servant to the late Lord Bamff, did kill Master John Gordon his brother, though it was found by a precognition in the Privy Council that he did it in his own necessary defence and in defence of his said Master, who was first mutilate and wounded by the said Mr. John Gordon and his accomplices before he was killed, yet the said Hary Gordon upon that accompt, continuing in his malice, did not only presume to call that slaughter and murder, but threatens and wastes the lands belonging to my Lord Bamff adjacent to him, and the said Walter Ogilvie meeting accidentally with him on the 12 of March 1672 in the house of Thomas Smith, where he was upon some of his Master's business, the said Hary upon no other pretext but that he was his Master's servant, did beat him with the smith's forehammer till he fell

dead, and then trampled on him and undoubtedly would have killed him if he had not been hindered by the neighbours, of the which crimes of beating and wounding the said Hary Gordon is actor, art and part.

Mr. Alexander Anderson[1] for the pannel alledged the Dittay was not relevant in so far as it did not condescend on a particular day wherein the alledged riot was committed. 2° The Lybell being only anent the alledged beating of the pursuer, it is by no law a poynt of Dittay. 3° Tho it were it was *res hactenus judicata*, in so far as the pannel having been conveened for the said crime, he was amerciat by the Sherriff of Bamff or his Deputes when the pursuer was present in the Court, whereupon his oath of Calumny is craved.

Replys Mr. Alexr Seton to the first That he oppones the Dittay bearing the 11th and 12th days of March to be condescended on or one or other of the days of the said month, which is sufficient. To the second also oppones the Dittay bearing beating upon precogitat malice and revenge *et non ex motu repentino*, in so far as its lybelled that he did it in resentment of his brother's death, calling it a murder tho the Privy Council had found it to be a killing in defence. Likeas this crime being committed by one neighbour against the servant of another, and whose lands are contiguous and who have great friends and relations upon both sides, the crime as it is so circumstantial is the greater because of the differences which it may occasion among relations, and therefore is the more severely to be punished. 3° No respect to the Sherriff's Decreet, 1° because not produced. 2° Because the Lord Bamff was not pursuer, nor is the party assythed. 3° the punishment is far less then the fault and therefore the Lords Commissioners of Justitiary may augment the punishment.

Interloqr The saids Commissioners ffand the Dittay relevant as it was lybelled bearing beating and wounding *conjunctim* and therefore wounding not being proven with the beating.

Verdict. The Assise assoilied and on the 4th March the pursuer is decerned to pay the witnesses.

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[1] Admitted advocate 1665.

Eodem Die.

The Lords Commissioners of Justitiary, considering that there are many of the old Registers and papers belonging to the Justice Court lying in the hands of John Bannatyne, sometime Clerk to the said Court, and that its necessary they be in the custody of the present clerk, do therefore grant Warrand that Letters of Horning be direct at the instance of [1] against the said John Bannatyne for delivery of the said old Registers and papers to the said present Clerk and that upon oath on a simple charge of six days. Horning summarily granted for delivery of the Criminall Registers.

Issobel Cochran having lyen long in prison for the alledged murder of a Child and none compearing to insist against her, she is sett at liberty, she enacting her self to compear on the 3d day of the next circuit in Glasgow or att Edinbr. upon a Citation of 15 days. Cochran, prisoner, sett at liberty.

Mr. William Nimmo against Sir William ffleeming, Commisar of Glasgow, for perjuring himself anent the payment of a Debt contrary to a Discharge. The pannel compears and produces a Decreet of the Lords of Session finding the Discharge to be no probative writt, and thereupon the Diet is deserted. Nimmo against ffleeming for perjury, deserted.

Edinbr. 4 March 1673.

Robert Steuart, Messenger, against James ffarqrson in Keithack, for deforcing of the said Robert Steuart in the execution of a Caption, deserted as to the said James ffarqrson compearing in respect the Criminal Letters does not condescend upon the day wherein the alledged Deforcement was committed, but all the absent Defenders are declared fugitives. Steuart, Messr. agt. ffarqrson for Deforcement deserted, and other Defrs declared fugitives.

Nota, that Absents are declared fugitives tho' the Letters be such as they could not have past to the knowledge of an Inquest, or, if they had compeared, by reason of the forsaid informality *in essentialibus*.

Nota 2° a difference betwixt such an informality and a null Citation, for where the Citation is null they cannot be declared fugitive if any compear and object the nullity as may be seen 29 July 1672, Adv. gt. Weir *alias*

[1] Blank also in Adv. MS.

Kennedy, where after he was declared fugitive two Advocates compears and takes instruments where the Letters were only execute upon 13 days. And therefore upon the 20 August 1672 wee find him again declared fugitive for the same crimes. The occasion of the difference is that a civil Citation is as no Citation, and a person not cited cannot be declared fugitive, and therefore it is that the sentence whereby an absent person is ordained to be declared fugitive bears these words as he who was lawfully cited to compear, but where the informality is in the lybell it may be supplied and often is supplied after Debate and the Def^{r} ought not to be contumacious when he is legally cited but should compear and propone the nullities against the lybell and if he prevail he will get expenses.

Mutual Lawburrows granted to the said Steuart and ffarqrson upon their desire.

Eod. Die. 4 March 1673.

The Sentence against Geo. Watson in Gray's hillock for a Ryot is pronounced which I have marked oft before beside the Process.

As also the Doom and Sentence of James Shaw for the Slaughter of Andrew ffleming which I have also marked beside the Process.

Lord Banff and Walter Ogilvy his servant are decerned this day to pay the Expences of the Witnesses adduced by them against Hary Gordon of Blairmad upon Petitions given in by the Witnesses, as also the said Lo. Banff and Walter Ogilvy having formerly craved that the said Hary might find Caution of Lawburrows. Pat Gordon of Leitchieston becomes accordingly bound and his Band is here recorded containing upon the end of it an Attestation by the Marquis of Huntly whereby his Lordship attests the sufficiency and becomes obliged for him.

Edinbr. 2 June 1673.

M^{c}intosh of fforthar against ffarquharsons for Murder, continued, as also Dougall agt. Banks and others both to the 9th inst.

Edinbr. 9 June 1673, Colington, Strathurd Preses, Newbyth, Craigie present.

Andrew Neilson against John Barns, Officer in Irvine, for beating and wounding, deserted.

Mr. Thomas fforbes, Doctor of Medicine and Robt Stuart, Messenger, against James ffarquharson in Keithock, and divers other persons, for a Deforcement, deserted because the Pursuer not present to insist, and the Pursuer's Cautioner is unlawed for not reporting the Letters, and not insisting. Also Alexander ffarquharsone in Keithock, one of the Defenders is declared fugitive, and Pat. Cowie in Brechin, his Cautioner, is unlawed.

James Mcalaster vic William in Kirkdells, declared fugitive for not compearing to underlye the Law in the Indytement of Theft pursued against him by the Procurator ffiscall of Spynie, and in a Lybell of Murder, Mutilation and others pursued at the instance of Angus Mcintosh brother to Gonadge and George Grant of Kirkdells, his Cautioner unlawed. Mcalaster for Theft and Murder fugitive.

Eod. Die.

The Lords Commissioners of Justiciary ordains the town clerk of Leith to deliver to the Clerk of Justiciary two Depositions taken by the Bailly of Leith anent the Murder of Da. Gray, Skipper in Dysert, committed by John Reidman, skipper in Leith, and that upon a Petition given in to them by the Relict of the said David Gray, shewing that these Depositions will tend much to clear the Murder which she is now pursuing.

Eod. Die.

John Mcintosh in fforthar agt. Alexander ffarquharson in Balnaboth for the Murder of his two sons continued till the morrow, and Duncan Mcoul of Kerro, Thos. Crichton in Miltown of Glenisla and John ffarquharsone in Cants Mill and his sons declared fugitives for absence in the same Process.

Eod. Die.

There is a Reconvention here insisted in, in the first place whereby the said John Mcintosh of fforthar *alias* Mcombie,

Mr. Angus M^cintosh his son, and Thomas ffleming, prisoner, are indyted and accused at the instance of Helen Ogilvy, Relict of the Deceast Robert ffarquharson of Burghderg, Alexander ffarquharson his brother, James, Alexander and John ffarquharsons his uncles, for themselves and in name and behalf of the remanent kin and ffriends of the deceast Robert and John ffarquharsons his Brother and his Majesties Advocate for his interest, for the Slaughter of the said Robert and John ffarquharsons committed by themselves and their Associates by way of Convocation and forethought felony in so far as, the said John M^cintosh *alias* M^combie elder of fforthar, and the said Mr. Angus M^cCombie[1] and the rest of his sons, accompanied with 24 armed men, did upon the 2d of January 1669 years or one or other of the days of the said month, lye in ambush in a bush of wood for the said Robert ffarquharson of Burghderg, of purpose to kill him as he was to pass from a House called Tombay in Glenshee, where they had intelligence of his being for the time. At least the said Mr. Angus M^combie accompanied with the saids persons did ly in wait in the said place and did intercept severall persons that passed by that way, least they should give intelligence to the said umq^ll Robert ffarquharson of their being in that bush of Wood, and missing their purpose at that time but still persisting in their malicious designs John, Alexander, James and Robert M^combies, 4 of the sons of the said John M^cCombie did upon the day of July or August 1670 or one or other of the days of the month of the said year, invade and pursue the said Robert for his life within the fforrest of Gleshory, and also failing in that design they pursued him and searched for him in severall other places and in particular in his going and coming to the Burgh of fforfar where he had occasion to be for defending himself in an Action pursued against him by the said John M^combie for the alledged Spuillie of certain goods which the said Robert as tacksman to the Earl of Airly in his fforrest of Gleshory had rightly seized upon. And in particular, they made search for the said Robert in the House of Torbeg where they supposed he was lurking and stabbed

ffarquharsons agt. M^cIntoshes *alias* M^combies for Slaughter.

[1] 'M^cIntosh' in Adv. MS.

all the beds with their Durks and Swords, and at last having got nottice from a poor man travelling on the road by threatning him, that the said Rob^{t} and John ffarquharsones were upon the way to Logie accompanied with their brother Alexander, the said Alexander and James M^{c}combies and the remanent persons above mentioned betook themselves to their arms and followed them to the lands of Drumglee where they killed the said Robert ffarquharson and gave such mortall wounds to his brother John that he died shortly thereafter of these wounds. All which was done by the command, instigation, hounding out and Ratihabition of the said John M^{c}combie and the said Mr. Angus M^{c}combie or one or other of them, and whereof they and the other persons above complained upon are are Actors airt and part, and therefore they and ilk ane of them ought and should be punished in their persons and goods to the terror of others to committ the like hereafter.

Sir Ro^{t} Sinclair for the Pursuers declares that *pro loco et tempore* he does not insist upon the first two deeds lybelled but as aggravations and to evince that the Pannell John M^{c}Combie and his sons did bear enmity and malice against ffarquharsone of Burgderg and insists only on the last part of the Lybell against John M^{c}Combie the ffather for command, hounding out and Ratihabition, and against his son Mr. Angus as airt and part of the slaughter lybelled, and not as actor, and against Thomas ffleeming.

Sir George Lockhart for the Pannell Alledges that this part of the Libell is not relevant unless it did condescend or were speciall as to the qualifications of hounding out, whether the same were relevant in Law to inferr any accession to the slaughter lybelled, especially the slaughter having arisen upon an illegall resistance and deforcement of the Messenger in execution of Letters of Caption against the Defunct. And as to that member of Ratihabition, it is most groundless and irrelevant, and it is *inauditum* in criminalls that a Ratihabition of whatever degree and quality can make any person liable to punishment or inferr any accession to a fact that was committed of before, unless the accession were otherwise proven than by words or deeds importing Ratihabition after the deed was committed.

ffarqharsons agt. M^{c}intosh *alias* M^{c}Combies etc. for Slaughter.

As to Thomas ffleming, alledges that tho it were proven that he was present when the slaughter was committed, which is denyed, yet the same can inferr no accession to the slaughter, because its offered to be proven that Alexander Strachan, messenger, being employed by James M^cIntosh to execute Letters of Caption raised at his instance against Ro^t ffarquharson, ffleming the Pannell, might and *de facto* was present with the Messenger as being required to be a Witness to the said execution.

Replys Sir Ro. Sinclair, the Dittay is opponed which is most relevantly lybelled, and bears that the said John and Mr. Angus, or one or other of them gave command or were accessory to the hounding out of the said John, his other sons and their accomplices committers of the said crime. And there is no necessity in the Lybell to condescend upon the particular qualifications which will result and appear upon the probation- And to that part of the Defence anent the Ratihabition that it is not relevant, its answered, wee do not insist upon Ratihabition as relevant *per se* but as conjoined with the rest of the members of the Lybell. And whereas it is pretended that the Slaughter did arise be the Defunct his illegall resistance of the Messenger who was employed to take him with Caption, and that ffleming, one of the Pannells ought to be assoillied because it was offered to be proven by the Messenger that he was taken along and required to be a Witness and Assistant to the Execution. Its answered that the said Defence cannot be sustained either to assoillie ffleming or to extenuate the guilt *quoad* the remanent Pannells, unless it were offered to be proven that the Defunct was seized upon and in the hands or required by the Messenger to become Prisoner by virtue of the Caption and did resist and offered to deforce, which cannot be proven, ffor albeit the Messenger might have a Caption and tho they were able to prove that he come out of fforfar, yet the truth is, and its offered to be proven, that the Defunct discovering John M^cCombie the Pannell his sons and their accomplices all in arms and following hard after him, and knowing their malice and their ffather and they having threatned and pursued him for his life, and being so unequall in number, they being 10 or 12 and none with him but his

two brothers, they did flee with all their speed and the Messenger never came within reach of speech of them. And finding that when the Defunct fled M^cCombie's sons and their accomplices threw away their plaids and betook themselves to their arms, and thereby discovering that their intention was to have his life and not to put the Caption to execution, the Messenger did return at least was not near the space of 2 or 3 or 6 or 7 pair of Butts to the place where the Defunct was assaulted and the Slaughter committed unless he had attacked him with his wand and the Defunct had offered actuall violence to deforce the Messenger, which is not alledged, nor can it be proven, and it is further evident that the wounds whereof the Defunct died was not in resistance of the Messenger but *in fuga* because it is offered to be proven that the shot and wounds were in his back. And albeit the Defunct had offered to resist the Messenger, which is denyed, the same can be no pretence to defend them against the Murder, seeing there was a competent remedy in Law, viz. to have broke his wand and pursued a Deforce.

Duplys Sir Geo. M^ckenzie for the Pannells that tho the Act of Parliament make airt and pairt relevant, yet it cannot be inferred from that, that command is relevant, since command *per se* without being condescended on is not a sufficient qualification of airt and part, and therefore the Lybell founded on command, except the terms wherein the command was given were condescended is not relevant. And if the terms were condescended on, they would be eluded by a suitable Reply which cannot now be offered agt. the generall, so that the Pannell is precluded of a relevant Defence and art and part is still in our law some fact or deed and not a simple command, nor are Ratihabition, and Ratihabition is in no law relevant except some previous accession were proven, and if meer words which seemed to own the deeds were sufficient, most part of the Lieges should be still Ratihabiters, it being most ordinary for men to say, even where they have no accession at all, 'I am glad such a man is fell'd,' 'it's well wared' or, 'he is justly killed.' And as to the Messenger's warrand and resistance, its offered to be proven by his own execution of Deforcement, so that all the Reply ought to be repelled as

contrary to the Execution, which proves clearly the opposition, and which is in law a sufficient legall probation, he being *in officio* and therefore assistance *nullo modo relevat* since it was in obedience to authority, nay nor killing *nullo modo relevat* tho it be denied, since opposition by arms is clearly proven by the Execution of Deforcement and a Messenger and such as are with him may in pursuance of authority justly use arms agt. a Rebel opposing authority, or else authority could never take effect, nor are they obliged upon the first resistance to suffer Authority to be baffled and then to pursue a Deforcement. Likeas Burgderg was known to be a person that publickly declared that he would never suffer a Messenger to take him alive, that he should either kill or be killed, as instances in the month of the same John M^c^intosh with severall witnesses having come to Burgderg's house accompanied with a Messenger to put the saids Letters of Caption in Execution against him, he deforced the Messenger and publickly declared that either he would kill or be killed before he would be taken.

Triplys Mr. David Dinmuir for the Pursuer, that the Reply made by the Pursuer to the Defence, stands relevant notwithstanding of the Duply proponed by the Defender because the Dittay lybelling hounding out upon the ffather and Mr. Angus part of the son's to murder Burderg, and he being accordingly murdered, that *per se* is relevant to infer the guilt lybelled because in law a Homicide committed by speciall order and mandate is equally punished in Law as if he were generall Actor and present, and its offered to be proven that not only the ffather gave speciall mandate to his sons to kill Burghderg, in so far as severall times before the time of the murder libelled, he said to his sons thir words or words to the like purpose, 'Go to fforfar, arm your selves with your pistolls and swords, take my servant with you and bring him dead or alive.' 2° That at severall times before that he said he should have his life for the many affronts and injurys he had done him tho he should ware two of his best sons in the quarrell, and who would or durst spear after it, and that at another time when his servants had mett with the Defunct in the fforrest of Glengarny and told him that they had let the

Defunct go without any prejudice, the Pannell John M^cCombie did either curse, upbraid or reprove them for not taking from him a leg or arm or his life, declaring that if they had done it he should have been their warrand. As also that severall times when ffriends were endeavouring a mediation betwixt them, the Pannell's expressions severall times were, that all was to no purpose, the sword behoved to decide it. That since the murder he wished he were but 20 years of age again, which if he were, he should make the ffarquharsones besouth the Cairn of Month thinner and should have a life for ilk ffinger and toe of his two dead sons. So the Lybell is most relevant in the terms @written, and in the mandate given by the ffather as said is, and as to Mr. Angus, its offered to be proven that the day of the Murder he made search and enquiry within and about the town of fforfar for the Defunct, and having gotten nottice where he was he went and hounded out the remanent persons his brothers and their accomplices, and sent his own servant in arms after him, and that after the Murder when his sister was regreting the loss of her brothers, his expression was, she had no reason to lament for them since they had got the life they were seeking. And to that part of the Duply founded on the execution of Deforcement signed by the Messenger, the same is noways relevant to assoillie the Pannell from the murder lybelled, because it is not *habilis modus* to prove deforcing of a Messenger.

2° the Messenger by a Letter written and subscrived by his own hand directed to James ffarquharsone of Lidnathie declares and takes God to witness he was not present at the slaughter of Burghderg, and as he hopes to be saved he was not within 6 pair of Butts when Burghderg was killed, and likewise declares he was not with Burghderg that day, so that the execution of Deforcement being but lately elicite from the Messenger *viis et modis* best known to the Pannell himself, and there being no witness to that execution but the same very Pannell, ffleming and Guthrie who is declared fugitive and by occular inspection its vitiate and interlined, the same is no ways relevant.

Mr. David Thoirs adds further, that albeit Burghderg had drawn a sword to the Messenger, which is denyed, and that

thereupon the Messenger had feared and fled, all pretext of authority was absent and went away with the Messenger himself, and whatever the Pannells might have pretended to have done, so long as the Messenger was present, yet they cannot pretend to the least Warrand for assaulting and murdering the Defunct after the Messenger was gone.

2° It is simply denyed that the offering a sword could be any warrand to them to fire guns, and when the Defunct was killed outright and his brother lying dead beside him, 6 or 7 of, if not all the persons complained upon, continued assaulting and stricking at the other brother, which evinces clearly their intention all along was not to defend or assist the Messenger but to perpetrate the Murder lybelled.

Quadruplyes Sir George Lockhart, that the Defence stands relevant notwithstanding of the Reply, and its a principle in Law that *in criminalibus non licet vagari* and generall Libells cannot be sustained but in the terms of Law, and if the Pursuer will insist in his Lybell in the precise terms of the Acts of Parliament, that the Pannells are accessory art and part the Pannells Procurators without farder troubling the Justices will find the Lybell relevant, but if the Pursuers do insist upon the generall term of hounding out upon that pretence that the Probation will make it speciall as to the qualification, the same is most unwarrantable and irrelevant. 1° Because the speciall qualifications that may be proven may be in Law relevant, and so the Justices in sustaining the Lybell behooved to committ Iniquity. 2° The Pannell might have relevant Defences in Law to elude the Qualifications that he cannot have after the probation, and therefore it is most just, reasonable and consonant to Law that the terms of the Lybell is as to hounding out not being in the terms of the Acts of Parliament should be speciall, positive and circumstantiate, that the Pannell be not prejudged of his just and lawfull Defences against the same. As to the Speciall Qualifications condescended on, viz. that the Pannells before the committing of the slaughter did desire the Committers to go and take their arms and bring the Defunct dead or alive or then come not back themselves, it is answered, this qualification and condescendance is no ways relevant and is no positive

mandate or order to kill, and evinces no more but *enixa voluntas* of having the Defunct taken with the Letters of Caption in the execution whereof they were then employed. And it is certain in Law that Generall Orders in Mandatts especially given *in materia licita* are ever understood *de terminis habilibus*, and the case being that a Caption was to be execute against the Defunct and it being nottour and known and which is positively offered to be proven that he had many times vented and spoke that he would never be apprehended with any Caption, and the Pannells thereby having just ground to fear and to be apprehensive of the Defunct, who was a most lawless and wicked person, would make resistance, altho it were proven that the Pannell had used the expression in the Reply, yet they can be no otherwise understood than that they should bring him, tho in the execution of the Caption by his unjust violence and resistance the case might degenerate into the case of self defence upon the Messenger's part and that Slaughter should ensue thereupon, and which is the proper and just import of the saids words, and in no law can be sustained to be a Mandate for committing Murder and *in criminalibus pars melior semper est sequenda*, and the Pannells being in execution of a lawfull Caption it must be understood in sense and reason that any generall warrand or order in these terms could mean nothing else but that all endeavours should be used to execute the Caption, tho in execution thereof any slaughter by reason of unjust or illegall resistance should happen to be committed and *hoc ipso* that it is acknowledged that the words were to bring the Defunct dead or alive, it is clear the Mandate was not to committ Murder, and as to the other qualification and expression, viz. that the Pannell said he would have his life tho' it should cost him two of his best sons, and all the other expressions of the same nature that were before the slaughter lybelled, it is answered, that part of the Condescendance is groundless and irrelevant, because these words do not in the least import the case of Mandate but only the case of *minæ*, and it is the opinion of all Lawyers as may appear by Clarus quest. 49. that *minæ præcedentes etiam cum effecto subsequuto* does import no Mandat but at most *indicium vel præsumptionem*, and even in

that case where the *minæ* were specifick and circumstantiate and vented and spoke by a person *qui minas solet exequi*, which cannot be here pretended, the words condescended on not being so much in law as *minæ*, but *verba jactantia* and generall threatnings and rants of that nature which are very ordinary in highland ffeuds, where no such thing is truely meant or designed, and the Pannells, viz. John and Mr. Angus M^c^intoshes were altogether innocent of the ffact lybelled and were not so much as present, and it were absurd and of great hazard to criminall judges to sustain a generall Lybell in any other terms than what is ordained by Law, whereas the qualifications condescended on does in no law import the case of any mandate, and where 3^d^ parties are not the actuall committers but at distance, an accession cannot be inferred against them, upon conjectures, presumptions and wrested expressions, which in the sense of the speakers and from the nature of the act it self, ought to receive a benign interpretation and cannot be wrested to import a crime, and the Pannells repeats the same Answer to the other qualifications, and as to what is pretended that the execution of Deforcement can make no faith unless it were otherwise proven, and 2° the Messenger has given a Declaration that derogates all faith from the execution and wherein he declares that he was not present nor did not speak with the Defunct that day, it is quadruplyed 1° That the Pannells repeat and oppone the Execution produced, and albeit the witnesses in the Execution are calumniously called as Defenders in this Process, yet by the event thereof it will appear that they are altogether innocent and so were and are most habile and proper witnesses to sustain the execution. 2° The Pursuers mistake the point, and the question is not, whether the execution *per se* be sufficient to prove the Deforcement which is not *hujus loci* and the Pannells will prove the same when they insist in their Lybell on that ground as accords. But the precise question here is, whether the said execution is sufficient to liberate the Pannells of a crime notwithstanding they had been present the time of the committing of the slaughter lybelled, which beyond all questions it is, ffor presence does never import a Crime where any lawfull cause is

condescended on for being present, whereas here there is a clear cause condescended on, viz. that the execution of Caption which was the occasion why the Pannells might have been present without any accession to the Crimes. And it is denyed the Pannells had any positive accession to the slaughter. Likeas the pretended Declaration it self elicite frae the Messenger is but extrajudiciall and was extorted by the menacing and threats from the clan of ffarquharsons, who are known to be a most powerfull and bloody clan. And the Pannells do humbly crave that the Justices would be pleased *ante omnia* to examine the Messenger who is a Witness adduced by the Pursuer, who as is hoped will sufficiently clear the Justices what unworthy methods and truckling has been made use of to overtake the innocent and to fix an accession against the Pannells who were not present and lossed two sons and brothers in the same bloody rencounter. The said Declaration may be likewise examined in regard whereof the pretended Qualifications are most empty and frivolous, and the same cannot be received to import a Mandate or to sustain a Lybell in any other terms than is allowed by Act of Parliament.

Sir Andrew Birnie for the Pursuer furder triplyes, that the Pursuers have no necessity to make any furder Condescendance than is lybelled, viz. Art and part, which is sufficient in the generall terms, but because the crime of thir Pannells was speciall and previous to the murder, the Pursuers were forced to lybell an speciall hounding out, which are terms equipollent to command which is broad Scotch and of which the Inquest must be Judge whether proven or not, and does not at all fall under the consideration of the relevancy of the Lybell if the Lo: of Justiciary be clear that command to committ Murder be relevant to inferr the crime and punishment of Murder. And the Pursuers shall sufficiently evince to the Inquest that the words condescended on will import command and hounding out, seeing the Caption which is the pretence of the violence did only warrand to apprehend the Rebell and incarcerate or to take Instruments upon the Deforce. And it is not debated but if violence be offered to the Messenger, that the Messenger then *qua privatus* and without his Blazon may repell violence by

violence, but it was never heard that a Messenger by virtue of Letters of Caption may proceed to Blood and Murder, and the Rebell ffleming to kill him with gun or other weapons invasive to hinder him to make an escape, which is the case lybelled, the Defunct having fled and being pursued by armed men with swords drawn and without so much as knowing that there was a Messenger in the company but be legally acquainted with the King's Letters they might have lawfully and in defence withstood that violence. The Pursuer does not contend that naked presence in being a Witness to the Execution of a Caption is relevant to infer the Crime lybelled, because it is offered to be proven that without any violence offered to the Pannell, he was assisting with arms drawn, and the Pursuer cannot be obliged to say that he did strick or wound, seeing to be in arms and with drawn swords was sufficient and in effect doth embolden the rest who were the immediate actors in the said murder.

ffarquharsons against Mcintoshes *alias* McComby for Slaughter.

2° Even presence as to this person ffleming is sufficient, seeing his place was to remain with the Messenger with whom it was pretended he came along as a Witness and who did not come by 6 pair of Butts near the Defunct, and the Pannell could not be warranted by the Letters to begin the execution of the Caption by violence and arms.

As for the Execution given by the Messenger, no regard can be had to it in this criminall pursuit of Murder because the execution cannot be extended beyond the Caption and can never import farther than a Deforcement, seeing the Law has allowed the Messenger to take Witnesses along with him and which he may make use of in case of Deforcement, but in this case the Messenger cannot offer violence except it be to repell violence, in which case the Messenger and his Witnesses cometh to be of the quality and in the condition of other private subjects who cannot be received as witnesses to give testimony in their own cause. That the Pannell ffleming after the Messenger was gone and Burgderg killed, did continue upon the ffield in arms and pursuing the Defunct's brothers, is an impregnable qualification of the Murder and does altogether elude and deforce the pretence of the caption which was allenarly against Burgderg himself, who being now killed, it

is absurd to justify farder violence after his death upon the ground of the Caption.

Sir George M^cKenzie for the Pannells Quadruplyes thereto that hounding out or command is no condescendance of art and part because command by word being that which receives various senses not only from the severall pointings of words which will differ the sense, but even from the various accents and way of speaking, therefore Lawyers have not thought a verball command *per se* relevant, as if a man should say when he were either troubled by importunity or by maladvertency, Go supe such a man in Brose. These words and that command would not inferr any crime or guilt, for there may be such mistake about words that in Civill Cases the only probation is the oath of the party because hearers may mistake or may forgett the least circumstance, which will alter the sense, and the Common Law has upon the same accompt made commands in Crimes not to be at all relevant *per se* unless other circumstances be condescended on, since these words having no sense at all to be the warrand of the Deponent, but memory which may be very far mistaken, and tho' it be not mistaken yet is lubrick. Therefore simple words *per se nullo modo* relevant. But 2° Tho verball command were relevant yet it must be only in the case where the words can receive no other interpretation in nature than such as may amount to a crime, ffor *verba sunt improprianda pro reo et conclusio sequitur debiliorem partem*, but so it is, thir words may receive another interpretation, viz. being spoke by a person who had a Caption, he might have desired these who assisted to bring him dead or alive, which is proven by these arguments, first, a person against whom a Caption is directed is a Rebel against whom Authority is to be execute, and there is a Warrand to take him which implyes that it must become effectuall, and the meanest Judges warrand beside a warrand under his Majesties Signett is a sufficient warrand to see the thing commanded made effectuall. And it is a rule in law that *quando aliquid conceditur omnia concessa videntur sine quibus ad hoc pervenire nequit*, and therefore to take a man does warrand whatever can be done against him if he resist, and resistance is expresly offered to be proven, and if a Bailly should but command an officer to

bring a man, such respect is due to Authority that if he should resist and the simple officer in the resistance should kill him, he is not liable as a murderer. 2° If this were not allowed, not only should no Caption be put in Execution but the worst of the Leidges should be still securest, and every man's sword should be his own Suspension and a Discharge of the Debt which would not only disappoint the Law but the occasion of all confusion imaginable.

3tio This being an exception which cannot be proponed for a Rebell and these who assist Rebells, and being proponed against authority as said is, it has less weight for them then for other opponents. As to all the other Mandats and expressions which were not upon the accompt of this Commission, the deeds to which these words relate not being lybelled, no respect can be had to them, for they are altogether extrinsick. And as to all expressions which followed *nullo modo relevat*, since they are but expressions, as was said formerly and might have had another interpretation, and this were to open door to the inferring of crimes agt. very many innocent persons, and to make passion interest and inadvertency crimes which the common law has not done even in the case of treason, and since no instance can be given wherever command or ratihibition did inferr a crime against parties not present, it is humbly conceived that this is not warranted by the law of our nation and especially where the person against whom the Mandat was given *versabatur in re illicita*, whom the law never favours because they can blame none but themselves, and it was not the Mandat but their opposition which inferred the killing lybelled. So that the point debated that opposition can only inferr a Deforcement but not a liberty to kill, is without all debate or reason. And as to the opposition, it is offered to be proven and that concerns not the relevancy, but it being found relevant as it ought to be, it shall be proven, and opposition being here the Defence must be remitted to the pannels probation and the opposition is thus condescended on. To witt that the Messenger having a Caption did desire Burghdargue to be his prisoner and to yeild in his Majesties name, whereupon Burghdargue did draw his sword immediatly. Whereupon the Messenger broke

his wand of peace, nor needs the Pannell say (assaulted) seeing assaulting would have been relevant where there is no Authority. But opposition is relevant where there is Authority, it being *res illicita* and was confessed that *contra versantes in illicito* warranted a person cloathed with Authority and such as assisted him, for if naked resistance by a Rebell were sufficient to make that persons having Authority could not proceed further, then Authority could receive no obedience, for they might securely stand to their defence, but it is a principle in all Law that a person resisting Authority may be killed. As to the probation, it does not concern the present debate but must be remitted to the Assise. But it is contended that a Messenger's Execution of resistance is sufficient to inferr that the Pannels should have a Dilligence for proveing by the witnesses insert that the opposition and deforcement was committed, nor can the citeing of the Witnesses as Pannels be sufficient to cast them as Witnesses for they may be presently pursued as Pannells, and so there can be no deforcement nor can the opposition given to Authority ever be proven and the Messenger is a most habile witness seeing that which is to be proven here is a separate pursuit from his interest, and it were a thing most absurd that if such as prosecute Authority were all killed by the opposers, except the Messenger and one of his Witnesses, that these two shall not be made use of for proveing opposition to Authority. And the execution being *Actus Officij* it must prepender a Declaration, which is not *Actus Officij* but is emitted after the Messenger is *ffunctus officio*, and is no more receivable against the Execution than the Declaration of a Clerk that he wrote not a Sentence or a Notar against his Instrument or a Judge against his Decreet, all these being *ffuncti*, and there being *jus quæsitum* by the execution it cannot be taken away, and this would ruin all Compriseings, inhibitions, poyndings, etc., being of great moment. Likeas it is very easie to force a Messenger to resile, and tho' these were contrary yet the Messengers judiciall Deposition should be that which must regulate all, he being before the Justices free of all impressions in respect whereof, etc.

The Lords Commissioners of Justiciary sustains the Lybell Interloq^r agt. M^cintoshes.

against John and Mr. Angus M^c^intoshes, Pannells, as art and part, and finds that command and hounding out in generall falls under the compass of art and part in such cases, but finds that the particular qualifications of command and hounding out mentioned by the Pursuers in the dispute are not relevant to extend to Mandate or hounding out to found a Criminall pursuit.

And as to the remanent Dispute against Fleeming, the Lords find that simple presence is not relevant against him but sustains the Lybell against the said Fleeming, it being proven that he either killed or wounded the Defunct Robert Farquharson, or assaulted him with arms or behaved himself as an aggressor, notwithstanding of the Messenger's Execution bearing him to be a Witness to the Caption.

The Lords continues this Dyet till to-morrow and ordains the Pannels and Alexander Strachan, Messenger, granter of the two contrary documents mentioned in the debate to be taken to the tolbooth in the meantime, and ordains the Pursuers' Witnesses and assisers to attend the said Dyet under the pain of 200 Mks ilk person.

This continuation was made as I suppose untill the contrary process should be tryed, but in the meantime James and Alexander M^c^intoshes, sons to the said John M^c^intosh of Forthar, Donald Earters, John Burr and David Guthrie, his servants, some others of the Defenders in the forsaid process who did not compear to enter the Pannel, are declared fugitives except that Andrew Spalding of Ashintilly and David Spalding his brother, John Robertson of Tullymurdoch, John M^c^Gillavrae, absent witnesses, are unlawed for their absence, as also Andrew Cassie, sclater, Walter Turnbull, surgeon, Alex^r^ Dobie, vintner, James Graham, merchant, and Alex^r^ Boswell, glasier, all indwellers in Edinb^r^ and absent assisers, are unlawed.

Edinbr. 10 and 11 June 1673.

The said 10th day these mutuall processes being called are again continued and on the 11 day the Lords begin with the process at the instance of the M^c^intoshes wherein

John and Alexander ffarquharsons, brothers to the deceast Robert Farquharson of Burghdargue, and John and Alexander ffarquharsons in Balnaboth his uncle, John ffarquharson in Dunmeday, John Barnett in Dunmae, Donald M^{c}vadinach in Burgderg, Geo. Paton, servitor to Burgderg, Thomas M^{c}Niccol, also his servant, Jo. ffarquharson at Mill of Judgzeon and Wm. ffarquharsone his son are indyted and accused at the instance of John M^{c}intosh of fforthar, defender in the former process, for coming with a number of 50 or 60 of their accomplices under the silence of night, in a warlike posture on the 1st of January 1669 to the House of Crandard where the Pursuer had his wife and ffamily, and lying there in ambush for him all night and apprehending him next morning before he put on his cloaths, and carrying him in that naked condition to the house of the deceast Robert ffarquharson of Burgdarg, and detaining him as a prisoner there till night, and from thence carrying him to a Wilderness called Tombay in Glenshee where they keeped him in strict and closs manner divers days, and the Pursuer's five sons, viz. John, Alex^{r}, James, Robert and Mr. Angus M^{c}intoshes, having come to that place where their ffather was, with their ordinary arms to interpose for his libertie, the saids Defenders did lay violent hands upon them and keeped and detained them prisoners till they compelled the said John M^{c}intosh the eldest son and three of his brethren to grant them a Band of 1700 mks for their liberty, and thereafter upon the 14 of May the forenamed persons complained upon, with 38 of their accomplices came and sew the lands of Killillock possessed by the said Robert M^{c}intosh, the Pursuer's 4th son, and thereafter the said Defenders being informed that the said 4 elder sons had gone to the Burgh of fforfar about their lawfull affairs in January last bypast, and that they had employed Alexr. Strachan, Messenger, to put a Caption in execution against the said Rob^{t} ffarquharsone at the instance of the said Jas. M^{c}intosh, and the said Ja. M^{c}intosh having in order to the execution of the said Caption taken his journey homeward, the said Ro^{t} ffarquharsone, Jo. and Alex^{r} ffarquharsones his brothers german, and the other persons lybelled did waylay the said John, Alex^{r}, Jas. and Ro^{t} M^{c}intoshes, sons to the

M^{c}intosh agt. ffarquharsons for Slaughter.

pursuer, and the messenger having offered to put the Caption in execution against the said Ro^t^ ffarquharsone, he and the other persons complained on, menaced him with death, whereupon the Messenger having required the said Jo. Alex^r^ Jas. and Robt. M^c^intoshes and their servants to give their concurrence as Sherriffs in that part and the said Jo. M^c^intosh, yo^r^, having in obedience thereto got in upon the said Ro^t^ ffarquharsone and having so secured him as that he was not able to do any present hurt, the saids John and Alex^r^ ffarquharsons, brothers to the deceast Robert and the other persons above complained upon while the said deceast Rob. ffarquharsone and Jo. M^c^intosh were thus closed, presented their guns and came so near them that the mouths of their guns touched the said John his fflank and fired upon him and so disabled him that he fell to the ground and by the same shotts killed Robert M^c^intosh the complainer's other son dead to the ground, and there being nothing to satiate their inveterate hatred and malice but the said John M^c^intosh's life and his sons, the said John ffarquharson in Cant's Mill, ffarquharson his son, Thomas Crichton in Milton of Glenisla, came in cold blood near to the moss of fforthar where the said Jo. M^c^intosh was yet alive lying in his wounds, and there with their durks and swords stobbed and wounded the said Jo. M^c^intosh untill he died, whilks crimes of convocation, bearing, wearing and using of guns, pistolls and other forbidden weapons, hamesucken, unwarrantable taking, incarcerating and detaining of and the beating, wounding, blooding, murdering and slaying of his Majesties Lieges, were committed by the command, instigation, hounding-out and ratihabition of James ffarquharson in Mill Judging, John ffarquharson in Balnaboth, Alex^r^ ffarquharson there, uncles to the deceast Rot. ffarquharson of Burghdarg, or one or other of them, and whereof they and the other persons @complained upon, were actors airt and pairt. And therefore they and ilk one of them ought to be punished in their persons and goods, to the terror and example of others to committ the like hereafter.

Sir Geo. Mckenzie for the Pursuer declares he insists upon the first two members of the Lybell founded upon the unwarrantable taking of the pursuer and carrying him to the Hills

and sowing his son's lands, and that he does not insist *pro loco ex tempore* for the murder of his sons.

Replys Mr. David Thoirs for the Defenders, that the Pursuer must insist for all, seeing the taking of the Pursuer's and sowing his son's lands are not the principall crimes lybelled, but only aggravations to evince that there was malice betwixt the Pursuers and the Pannells, and seeing the deeds of his Lybell, which is the Killing the Pursuer's two sons by the Pannells and the deeds of reconvention, which is the slaughter of Burgdarg, was done about the same time and upon the same occasion, and it is absolutely necessary that both Lybells be cognosced together and put to the knowledge of an Assize, or that the Diets desert in both, specially considering that the witnesses adduced are the common witnesses for proving both Indytements. M^c^intoshes agt ffarquharsons for slaughter.

Duplys Sir Geo. M^c^kenzie, that he cannot be now compelled to insist in the Lybell raised at the instance of John M^c^Intosh against the ffarquharsons because his materiall witnesses are not present, and as to the other pursuit at the instance of the ffarquharsons against M^c^intoshes *res non est integra* because there is a full debate and an Interloq^r^ wherein the relevancy of the Lybell and Debate is discussed.

Triplys Thoirs that he produces a Deputation frae his Majesties Advocate and craves for his Majesties interest that in regard the Inquest is not sworn nor Probation adduced before them, and that the most materiall Witnesses are absent, so that the Probation stands yet entire, therefore that the Diet may be continued as to both or deserted as to both.

The Lords Commissioners of Justiciary having considered this Debate, they desert the Diet at the instance of this Pursuer Jo. M^c^intosh agt. the ffarquharsons. Interloq^r^

And immediately thereafter having called the other Pursuit ffarquharsons agt. M^c^intoshes and Mr. David Thoirs having resumed his former Defence viz. that the M^c^intoshes cannot be put to the knowledge of an Assize except the other Process had also been put to the knowledge of an Assize in regard of the connexitie betwixt them, the crimes of both Lybells being committed at the same time and upon the same occasion and that the materiall witnesses were absent, and in respect ffarquharsons agt. M^c^intoshes again called and deserted.

that now the other Diet is deserted therefore craves that this may be also deserted, whereupon the Lords Commissioners of Justiciary of consent of Parties desert this Diet also.

Lawburrows granted H. Ogilvie agt. M^c^intoshes.

Immediately thereafter Helen Ogilvie relict of Robt. ffarquharson of Burgdarg craves Lawburrows agt. M^c^intosh of fforthar, which is granted. And at the next Dyet which is the 16 June, Thomas Fleeming in Dalmaner in Glenisla, who is one of the Pannels, conveened with John M^c^intosh by the ffarquharsons for the Slaughter of Robt. ffarquharson of Brughdargue, and prisoner in the Tolbooth of Edinbr. he gives in a Petition to the Lords Commissioners of justiciary shewing that he was innocent of the crimes lybelled, and came only alongst with Alex^r^ Strachan, messenger, to be a witness to his execution of the Caption against Brughdargue and that if they could have qualifyed any accession as to him, they would never have deserted the Dyet when the Witnesses were present as they have done therefore craving to be sett at liberty upon Caution to appear when he shall be called, which is granted.

Thos. Fleeming upon petition is set at liberty.

The contrary documents produced by the Mess^r^ in these processes, to wit an Execution of a Caption.

As also on the said 16th day the said Messenger compears before the Justices and there is produced and read to him two contrary documents which he had granted in the above written processes and whereof mention is made in the first Debate following upon the Lybell raised agt. the M^c^intoshes, the first of these documents is the execution of the Caption wherein he declares that he went with John, James, Rob^t^ and Alex^r^ M^c^intoshes, sons to Forther and having Letters of Caption at the instance of the said James against Robert Farquharson of Brughdarge, he by virtue thereof charged Brughdargue to render himself prisoner to him conform to the tenor of the Letters, who most contemptously disobeyed and made resistance by drawing of a sword agt. him and his assistants, and that thereupon he the said Messenger broke his wand of Peace before Witnesses, Thomas Fleeming and David Guthrie. This Execution is subscribed and stamped.

On a Missive Letter.

The next document is a Missive Letter written by the Messenger to James Farquharson of Lednethie, where he says that he heard it was laid on his name that he was present at the Slaughter of his nephew Broghdargue, and takes God to be witnes before whom he must appear and as he hopes to be

safed, he was not within six pair of Buts when he was killed, and declares that he did not speak with Brughdargue that day. This letter is dated 4 ffebry. 1673.

After the reading of the said Executions and Letter, the Messenger is interrogat by the Justices if he did not write them both and subscribe them. In answer whereunto he declares that he wrote and subscribed both and that the letter is of a true date as it bears, but that David Fenton in Logie, a friend of the Farquharsons did extort the Letter from him in manner following, that he came to his house at Forfar and told him that the Farquharsons were all at Kirriemuir and had vowed to kill him if he would not subscribe such a Declaration, whereupon he subscribed that Letter for his own safety, and as to the Execution of the Caption, declares he wrote and subscribed it since he came to Edinbr. about the 9th June inst. at the desire of the M^{c}intoshes but had neither good deed nor promise for the same, and tho' Thomas Fleeming be insert as a Witness in the Execution yet he the Messenger did not carry him alongst with him to be a Witness but found him among the M^{c}intoshes company or M^{c}omby's as they are called. And as to the matter of fact, declared that he spoke not with Broghdargue that day he was killed nor was near him by six pair of buts, only he cryed to Broghdargue at that distance to render himself prisoner upon the Caption, and those who were running after Broghdargue did cry the same aloud to him, but knows not which of them Broghdargue did hear but that Broghdargue cryed aloud he would be taken by none of them, and then ran thro' a moss and the M^{c}ombies after him leaving him, the Messenger, behind, and that Broghdargue was killed before he, the Messenger, came within six pair of Buts of them. And then comeing up and finding Broghdargue was dead, he, the Messenger, broke his wand of peace against them all. This Declaration is subscribed by the Messenger and Craigie as President, that day.

The Messenger's Judiciall Declaration anent that Execution and Letter.

Immediatly after this Declaration there is a Petition subjoined, given in by the Messenger to the Lords Comm^{rs} wherein he narrates all the point of ffact anent the way and manner of Extorting the Missive Letter from him contrary to the tenor of the Execution of the Caption under his hand,

Petition given in by the Messenger for his liberation but refused.

and says he knew not the import of it in Law and thought it would never be binding being extorted, and being now in prison and thereby frustrate of the use of his calling, craves to be sett at liberty, in respect he is content to depone that the Missive Letter was extorted in manner forsaid, whereupon there is a Deliverance bearing that the Lords Comm^rs having considered the Petition with the Execution of the Caption and Missive Letter written and subscribed by the Supplicant with his Judiciall Declaration thereanent, also subscribed by him this day, they find that the Supplicant has prevaricat greatly in his office and that he is such a person as should be deprived of all publick charge and therefore recommends to the Lord Lyon to deprive him of his office and to make publication thereof at all mercate crosses neidfull with his first convenience, and ordains the Supplicant to be carried back to prison, there to remain during their further pleasure.

Nota. The Messenger's fault was double in this point, first, being within the Burgh of Forfar when he wrote the Missive Letter, he did write the same upon the threatning of a single person, which could be no sufficient threatning within a royall Burgh, specially he not being threatned with present death. 2° He committed falshood in granting the forsaid execution after he came to Edinbr. contrary to the tenor of his Judiciall Declaration and the truth.

Edinbr. 16 June 1673.

There is marked at this Dyet beside these things which relates to the Processes of the Farquharsons and M^cintoshes which I have joined to these Processes in the former Dyet. I say, beside these there is marked there.

The Earle of Glencairn and his factors against Rob^t Smith, elder of Sundyburn for Usury, deserted.

Alexander Grant, in Elgin, against Thomas Gordon of Myretoun, Alexander Mill in Germouth and Alexander Symon in Raphin, for robbing and stealing some malt belonging to the complainer, with some bear, oats and ffodder, and a horse belonging to him, out of the houses of James Smith

and George Anderson, in Clashtyreme. This Dyet also deserted and the absent witnesses unlawed.

Edinbr. 23rd June 1673.

This day these two Dyets are continued, to wit, Home agt. Nicolson till to-morrow, and Campbell agt. Campbell till this day eight days.

Edinbr. 24 June 1673. Present in the Court Collingtoun, Strathurd, Castlehill, Newbyth, preses and Craigie.

John Nicolson, prisoner in Edinburgh indyted for the shooting of David Horn in Mawmill, thro' the body with a gun loaded with ball, without any provocation, when he was peaceably in company with other two men drying his corns at the Mill of Dewhill, which fact was committed on the 20 Aprile last.

Mr. Pat. Oliphant[1] for the Pannell alleadges that if the Pannell committed this fact, which he denys, it was at a time when he was not in condition to remember, and craved the benefite of the Act of Parliament anent casuall homicide in all the degrees thereof.

Replys my Lord Advocate, that the Denyall and the Defence are inconsistent and it is impossible that the Pannell should be free of homicide, and yet that he should have committed it casually, and takes Instruments upon the proponning of the Defence, and the Defenders acknowledgement that the homicide was committed by him, but with the quality that it was casuall, and the forsaid Defence as to the said quality is nowise relevant in so far as it does not contain any relevant qualification of Casuall homicide, to witt that the Defender was *in actu licito* as in the case of throwing stones over Dykes and killing accidentally any passenger on the other side of the Dyke or such like. And the Indytment is opponed being positive as to the Pannel's guiltiness of the homicide therein contained.

Duplys Sir George M^cKenzie for the Pannell that he condescends upon the Qualifications of the casuall Homicide to be these, viz. that having no prejudice nor knowing the man

[1] Of Newton; admitted advocate 26th December 1649.

killed, he was coming by the Mill and called for a Lippie of Sidds to his Doggs whereupon the miller called Andrew Anderson to bring the Sidds and the Defunct fell upon him alledging he was a ffrench soldier or fitt to be one and desired them to secure him, and they falling on him and struggling with him, if the gun shot it was by the struggling, she being a half bend and he was in *actu licito* when he carryed this gun, because he was Tirriboll's ffowler who was in use to keep him and pay him a ffee for that trade, he being infeft in his Barrony of Tirribol and Muirs thereof, where there is good fowling, and this being an usuall trade allowed by ordinary custom, it cannot be denied to be *actus licitus*, and the Pannell conceives it sufficient to defend him agt. this Slaughter which could not be imagined he intended to committ, he never having known the person and he not having given the first rise as said is.

Triplys Advocatus, that the Qualification forsaid of Casuall Homicide is not relevant in respect Casuall Homicide is only in that case where Homicides is committed by meer chance without any preceeding *culpa* upon the part of the committer of the same, seeing it cannot be denied but when the deed is not someway casuall yet *si præcessit culpa* and the person be killed, the doer is liable and *tenetur de occiso* as the case mentioned in the Law, when any stone is thrown over a Dyke and on the other side, the people were in use to pass, the person who throws over any thing that kills any person on the other side tho' he was altogether ignorant that the time he threw the same over that there was any person on the other side, yet in law he is liable in respect he was *in culpa* to throw over where people were in use to go, and in this case the Defender was without all question *in culpa* tho' the qualification were true, which is denyed in respect it was a fault to go through the country with a gun, being forbidden by severall Acts of Parliament, and it was a great fault he should have a gun that was in use to go off on half bend, as he acknowledges himself. The Acts of Parl. prohibiting wearing of guns are Act 16 and 18 Parl. 1 Ja. 6 and Act 87 Par. 6 Ja. 6, and Act 248[1] of his 15 Par. with many old Acts of K. Ja. the 1. 2. 4th and 5th.

[1] 252 in the 12mo edition.

Quadruplyes Sir Geo. M°Kenzie that the forbidding of guns by Act of Parliament is so far in desuetude as not to inferr *actum illicitum*, and if a ffowler should be shooting at a ffowl or beast and should kill a man, it were not legall to inferr Murder against him thereupon, or if any man having a half bend in his hand should go off and kill a man, the wearer could not from that be said to be guilty of slaughter, which and many other instances shew that neither the carrying of a gun nor having a half bend takes off the Qualifications of casuall homicide, the law considering mainly the design of the actor in crimes *nam præpositam maleficiam distinguit.* 2° Tho' there were some fault, as there is none, yet *homicidium culposum* does not in law inferr Death, especially where the fault is so small as in this case.

Quintuplyes his Majesties Advocate, that whatever the custom be in highland and lawless places, yet by the forsaid Acts of Parliament, it is unlawfull to carry guns without a Warrand. Neither is it usuall to carry guns in such a countrey as ffife, and Lybells before the Councill for carrying of guns are both ordinary and ever sustained, and where it is pretended that *Homicidum culposum* is never punished capitally, and that the Law considers *animum et præpositum*, it is answered that *in actibus illicitis* and especially in homicide and shedding of blood, the law presumes *animum et intentionem*, tho not always of forethought ffelony yet *ex impetu*, and the Act of Parliament anent Casuall Homicide is opponed containing certain exceptions and cases in which Homicide is not punished capitally, of which *Homicidium culposum* is none and *exceptio format regulam in non exceptis.*

Sextuplyes Sir Geo. M°kenzie, that there are some faults *quæ æquiparantur casui* such as *facere quod omnes faciunt* and such are in our Countrey for ffowlers to carry guns and half bends, and the throwing the stone over a Dyke, if it was not in an unlawfull exercise would not take off the Defence of Casuall Homicide.

The Lords Commissioners of Justiciary having considered the Lybell and Debate, they found both the Lybell and Defence relevant and remitts the Pannell to the knowledge of an Assize upon both. Interloqr.

Proof.

Jo. Niccolson for shooting Da. Horn.

The King's Advocate for probation adduces 8 Witnesses. There is only one of them, viz. Andrew Anderson, miller at Dowmill, who saw the fact committed, and he depones upon the verity of the Lybell as its circumstantiate and declares that there was no other cause or quarrell but that the Pannell heard the Defunct rounding to the Deponent's wife that the Pannell was drunk. Whereupon the Pannell cryed Webster Loun are ye scorning me, I shall shoot yow, I shall shoot yow, and bended and presented the gun three times and at the 3d time shot him, whereupon the Deponent laid hold on him and delivered him to James Paterson in Craigend, and that they two bound him till the neighbours mett, and the said James Paterson depones he heard the shot, being within 2 pair of Butts, and that he came up and the Pannell was delivered prisoner to him be Andrew Anderson, and confessed the crime to him and desired him to kill him and lay him beside the Defunct, and depones he saw the Defunct lying dead, but saw not the fact committed, and all the rest of the Witnesses depones the same, to wit that they saw the Pannell lying bound and the Defunct dead, and heard the Pannell confess to them except the last witness, viz. Baillie Pitcairn in Edinb. He depones only upon the Pannell's confessing to him when he came to the Prison of Edinb^{r}.

Jo. Nicolson for shooting Da. Horn.

Verdict.

After leading of the Probation and inclosing of the Assize, the Court is continued till the morrow and the Assize then ordained to return the Verdict.

On the morrow being the 25 of June the Assize finds the Pannell guilty of the Slaughter lybelled upon the Depositions of the witnesses, whereupon he is sentenced to be beheaded at the Grass Market of Edinb^{r} upon Wednesday the 9th of July.

Eodem Die.

Alexander Straughan, Messenger, who was imprisoned upon account of the mutual Processes, being now deprived conform to the Lords Ordinance, is sett at liberty.

Edinb^{r} 30 June and 1 July 1673.

John Campbell of Lerages and others for the Rape of Jean Campbell, Relict of umq^{ll} Arch^{d} Campbell, ffiar of Ardchattan, continued till the morrow.

Eodem Die.

Robert Robertson, soldier, for Slaughter, continued till this day 8 days.

Eodem Die.

The Diet Christian Adam, Relict of Andrew Liddell in Cringate, against Andrew M^c^farlane in Thister Rippoch and others continued.

The said 1st of Day [*sic*] the said Dyet, Jean Campbell agt. Campbells, deserted, in regard the Pursuer was not present to insist, and the absent Witnesses are unlawed.

Eodem Die.

Alexander Webster being imprisoned in the Tolbooth of Edinb^r^ for not finding Caution in the action of Deforcement pursued against him be Robert Stewart, he presents a Petition to the Justices anent the poverty of his condition with a Testificate frae the Bishop of Brechin, to instruct it, and represents that the reason why he did not find Caution was that he was ignorant, and did not understand the formality of law, and therefore craves to be sett att liberty.

The Lords Commissioners considering the poverty and ignorance of this poor man and the loss he has by his imprisonment, ordained their clerk to expede a Relaxation and charge to put at liberty for the Petitioner, and to cause him enact himself in the Books of Adjournal for his appearance before them the 10 of November next.

Eodem Die.

Andrew M^c^farlane and others declared fugitives for the Slaughter of Andrew Liddell, and their Cautioners unlawed.

Robert Robertson for the Slaughter of William M^c^clellan, his fellow soldier, in a Duel, continued, as also Robert M^c^Culloch for the Crime of Incest, both to this day 8 days, also the Earl of Middleton and David Crile in ffettercairn, against Balbegne and others to the same day.

The pronouncing of Sentence against Mr. David Gordon of Auchynonie in the Action pursued against him by the Laird of Culter and the King's Advocate, continued till the 3d November.

Edinbr 14 July 1673.

The said McCulloch is further continued and the Earl of Middelton's Cautioner is ammerciate for not reporting the Criminall Letters.

Eodem Die.

Robert Robertson's Lybell is read and the names of the Advocates on both sides but nothing marked to be done in it but a little blank left. I remember it was debated.

Edinbr 21 July 1673.

The Magistrates of Aberdeen agains Irvine of Hilton, continued till Wednesday next, being 23d July, as also the Dyetts at the instance of the King's Advocate agt. Donaldsone for false measure, and the Dyet Donald McDonald of Cullochie agt. Mcpherson of Clyne.

Edinb. 23 July 1673. The Lords present are Colington, Strathurd Preses, Castlehill, Newbyth and Craigie.

The said day ffrancis Irvine of Hilton entering, the Pannell is indyted and accused at the instance of the Provost, Baillies, Dean of Guild and Treasurer of Aberdeen, that albeit by the Common Law, the Law of Nations, the laws and inviolable practique of this kingdome, the crimes of breaking and demolishing of publick Prisons or procuring by violence the escape of persons imprisoned therein, and especially of malefactors for publick crimes, are crimes of a high nature and punishable by the same pains that was due to the malefactors imprisoned ffor the saids crimes and by divers other great pains and punishments, nevertheless it is of verity, that the Town of Aberdeen having a sufficient prison house for keeping of malefactors and persons imprisoned for Civil Debts, and the said ffrancis Irvine, William fforbes of Old Aberdeen, Robt. Bayne in Standing Stones, and James Bannerman in Ardmurdoch, being all prisoners for civill debts, and Alexr Hay and Robt. Anderson being prisoners for Theft lybelled, the said ffrancis Irvine and the other persons @named designing to make their escape, and knowing that the Prison was sufficient and well kept, they caused convey in Gavelocks and other

instruments fitt for breaking thereof, and upon the 6th, 7th and remanent days of the month of March last or ane or other of the days or nights of the said month they did there with break the Pend and vault floor of the room where they staid and by the help of a Tow came down to a publick room below it, called the Laigh Tolbooth (which is the room where the Sherriff Court sitts) and broke open the great door, and all the forenamed persons did make their escape, and not only did they make their escape, as said is, but they have damnified the ffabrick of the prison in the sum of 6000 merks, of the which crimes the said ffrancis Irvine is Actor art and part, and concludes punishment and payment of the 6000 mks.

Magistrates of Aberdeen agt. Irvine of Hilton for Breaking Prison.

Mr. Alex[r] Seton for the Pannell Alledges that the Dittay is not relevant because tho' it be founded upon the Common Law and practique of this Kingdome, yet it condescends upon no Law whereupon either the crimes or pains lybelled can be inferred. And seeing it is only subsumed that the Pannell was imprisoned for a Civil Debt, there is no Law Common or Municipal can be adduced to inferr the Crimes and pains lybelled against the Pannell for making his escape.

In that case but on the contrary its clear by the Common Law in these Titles ff. and L. *de effractoribus carcerum, et de custodia et exhibitione reorum*, and by the Doctors writing thereon, that such persons can only be criminally conveened for breaking and escaping out of Prison as were there for criminall causes, and the most that can be pretended is, that persons being imprisoned for Civil Debts may be conveened for actuall breaking of Prison but never for single escape, it being lawfull for every man to make his escape when he has the opportunity, and the only punishment for escape is, that the Debtor shall be simply liable for the Debt and be deprived in all time thereafter of the Benefite of his law Defences.

Replyes his Majesties Advocate that the Dittay is opponed which is most relevant without condescending on any Laws in the Proposition, ffor the Law is and ought to be known to the Judge, and a Dittay is relevant without a Proposition and the Crime contained in the Proposition, viz. Breaking of the King's Prison, and robbing his Majestie of his Prisoners is a crime so attrocious and so nottour that there needs neither a Proposition

nor a condescending on particular Laws, the Common Law and Law of Nations being so unquestionably clear as to the same. And whereas it is pretended the pain ought only to be payment of the Debt, the Pannell being only imprisoned for a Civill Cause, and that he should not be heard upon a Defence for eliding the same, is remmitted to the Lords of Justiciary that the pain of such a Crime is and ought to be which is no less in Law than that the Delinquent should be *capite puniendos* as appears by the Law ff. *de effractoribus*, whereby it is clear that both *ffractores* and these who have any accession to the breaking of Prisons, and these *qui evasere* without distinction, are to be capitally punished, and if the breaking of the houses of private persons and the embazling and stealling and giving occasion to embazle and steall their goods, is a high and capitall crime, much more the Violation of Authority so far as to break his Majesties Royall Prison, and to dismiss and occasion the enlargement of his Prisoners, is a high and capitall crime and more than ordinary Hamesucken. And the pretence that the Pannell was only incarcerate for a Civil Cause is so far from being an extenuation that it is a high aggravation of the crime, seeing the Pannel has a legall remedy for his Imprisonment either by Suspension or otherwise, and neither ought nor needed to have proceeded to such a height of contempt of his Majesties Laws as to break his Prison.

Duplys Sir Geo. M^{c}kenzie for the Pannell, in so far as the Lybell subsumes actuall breaking or express making open of Locks, Walls, or Doors of the Prison or actuall assistance to these who did so by making use of Gavelocks or any other Instruments, he finds it relevant of Consent both *quoad* the Proposition and Subsumption, but if art and part be extended to reach simple going out of the Prison which others broke, that art and part if it be so condescended on and proven, is not at all relevant either to inferr the pains and punishments nor payment of the Dammage lybelled against the Pannell, ffor 1° by our Law there is no Statute nor Custom ordaining a simple going out of Prison when the Doors were any ways open without his consent, to be a crime. 2° The Common Law under the Title cited by his Majesties Advocate punishes

only, ff. *ffractores Carcerum* but not simply *eos qui effugerunt.* 3° The reason of the Law does not militate in simple going out, ffor there is neither Vis nor Hamesucken, nor is there any prejudice done to the Prison by him, and where the Law speaks *de ijs qui evaserunt ffractis carceribus* as punishable, it must only be meant and can suffer no other interpretation but *de* ff. *ffractoribus evaserunt.* ffor the Laws of a Title must be interprete according to the Rubrick and the Rubrick will import no more but *de* ff. *ffractoribus qui evaserunt*, and altho all the Escapers being Prisoners, for Criminalls should be as guilty as ff. ffractors, yet we have neither Law nor practique to make Prisoners for Civil Debts punishable for a simple escape, and there cannot be an instance adduced tho the case has daily existed.

Triplys Advocatus. That he oppones the Dittay being lybelled as relevantly as any Criminall Lybell, that the Pannell is guilty of the crime lybelled at least art and part, and there needs no other Qualification of the Pannell's Accession to be condescended on than that which is lybelled, ffor the Crime being attrocious and committed in a clandestine way under silence of night when none could know or distinguish what every man's part and action was, and it being the duty of every subject where such a crime is committed to the affront of authority, to hinder and obviate the same, the Pannell *qui non prohibuit* must in Law be understood *fecisse*, and seeing he did not stay behind the rest to declare who were the Actors and that he concurred not, but on the contrary went alongst with the other prisoners, by going out at the Doors being open, and came down upon the Tow that was hung by them in the Vault after it was broke, all which circumstances does amount to a clear Evidence and *Presumptio Juris et de Jure* of the Pannell's Guiltiness and Accession, and the Law (viz. L.1 ff. *de effractoribus*) does not consider *quis effregerit* but says *De his qui carcere effracto evaserunt sumendum supplicium*, and again adds these words *Saturninus etiam probat* [*in*] *eos, qui de carcere eruperunt sive effractis foribus, sive conspiratione cum cæteris qui in eadem custodia erant, capite puniendos*, and oppones the authority of Skeen a most solid and learned Lawyer, and the Laws alledged be him.

And as to what is pretended upon the head that the Pannell was only a Prisoner for a Civil Debt, oppones the former Answer.

The Magistrates of Aberdeen agt. Irvine of Hilton for breaking prison.

It is added by Sir Geo: Lockhart, that seeing its acknowledged and cannot be controverted that the breaking of a publick prison is a publick crime and severely to be punished and vindicate, and the Pursuers have libelled that the Prison of Aberdeen was broken and that the Pannell was accessory art and part thereto, so that what shadow of question can there be as to the Relevancy. And the Pursuer is not obliged to condescend or be speciall as to the qualifications of art and part, because that will arise upon the Probation, and the Act of Parliament has declared that Criminall Lybells in the generall terms of art and part are relevant, and besides, publick prisons being broken and the Pannell escaping at the same time, in Law it imports an accession to the crime lybelled, unless the Pannell would condescend and offer to prove by way of exculpation and defence that the effraction and violence was committed by others and that *ex post facto* he thereafter escaped.

Quadruplyed by Sir Geo. M°kenzie for the Pannell, that tho it be sufficient to lybell art and part in generall where the Qualifications thereof are *in facto*, yet where the Qualification of art and part is *in jure*, it is ordinary allowable and necessary for the Pannell and Assize that it be condescended on and debated, but so it is that this Defence is *in jure* relevant, ffor there can be no crime where is no law and express Statute ffor crimes cannot be inferred without Statutes, nor is the Civil Law sufficient to inferr a Crime, as is clear by severall Acts of Parliament, viz. Ja. 1. Parl. 3. cap. 48 and Ja. 4. Parl. 6. cap. 79, whereby the subjects of this Kingdom are to be governed by the Laws of this Kingdome and not be any forreign Laws. And there are many crimes punishable by the Common Law which are not all punishable by ours, so that except where the crime is against the Law of Nature where Statute is wanting, there must be a constant custom making simple going out to be punishable a [*sic*] Civil Law *per se* cannot infer a Crime where the question frequently existed, and the reason of punishing it was the same, and yet

it was not punished. And as to the citation of Civil Law and Skeen's authority founded thereon, it is still but a Citation of Civil Law. 2° The former Answer is opponed making such as escape to be only punishable when they are also effracters, and the citations militat only in that case, and it were absurd to think that simple going out can be meaned there, for then simple going out should be capital, tho he who goes out were only imprisoned for a Civil debt. This would be against the Laws of Christianity and by the Title cited its evident that none are punishable there but such as are capitally punishable, and when Lawyers do consider going out they still consider when it is a going out at open doors *effractis compendibus*, so there still must be *effractio vel ruptio* upon the part of him who goes out before he can be criminally liable, ffor simple outgoing does not prejudge the publick nor any private person except as to the payment of the Debt, *ergo* it should not be punished.

Whereas its pretended that the pannel ought to have revealed or hindered, its answered that concealing or not hindering is only punishable in the crime of Treason or where the partie was bound to reveal and hinder *ratione officij*, but tho either of these were the case, as they are not, yet the pannel could not hinder being but one against many, and he could not reveal, being in the night time, and suppose he had made use of the rope for his escape, which he denies, yet that not being a *fractio*, was not culpable. And whereas its also contended that the pannell's denying his accession to the breaking of the prison and delivering it upon tho other prisoners should be proponed as a Defence and proven, its answered that the lybell being irrelevant in so far as it condescends only in generall on art and part, when it ought to be speciall, its not necessar to propone and prove a Defence. And even as to the Probation, there being nothing offered but a presumption that he came out, this can never be sufficient to infer a guilt and accession. And whereas it is pretended that if this presumption were not sufficient, this crime could never be proven, its answered that this may be as well urged to make *socius criminalis* capable of bearing witness, and yet the Law allows them not, and it is better the crime should not be proven

than that it should be proven by a presumption. 2° It may be proven in many cases by such as saw or stayed. 3° The presumption is taken off in this case, because there was no reason for his breaking of prison, being only imprisoned for payment of £40 which was offered and numbered, as an Instrument produced proves, and his appearance at this time, and all the Debts being unjust and being suspended, he needed not break the prison for these, and I am just here in a Case as if I went from a Messenger who were [*sic*] standing beside me.

Interloqr Sir George Lockhart for the Pursuers Declares that he insists only *ad pœnam arbitrariam.*

The Lords Commissioners of Justitiary ffinds the lybell, Reply and Triply as they are declared *ad pœnam arbitrariam* Relevant and admitts the same to the knowledge of an Assise.

Probation. The Pursuer for Probation adduces several witnesses and the first two of them are town officers and Jaylors, there being no other Jaylors at Aberdeen but the town officers who are admitted as Witnesses, notwithstanding of this objection (which was proponed as I certainly remember, tho not marked in the books) that they being Jaylors they might tine or win in the Cause, in respect that if they should not prove the lybell and that the pannel escaped by breaking the prison, then and in that case the escape will be imputed to their negligence, and so they and their Cautioners will be liable for the Debt, which Objection the Judges repelled and admitted the said witnesses *sine nota*, and they and the other witnesses do sufficiently prove all that is intended by the interloqr, to witt the pannell's art and part as its qualified of the breaking of the prison, in so far as they prove that the prison was sufficient when he was put in it, and that they found it broken in manner lybelled at the next day after they came out, and that the usual passage to the prison stood locked as they left it the night before.

But notwithstanding, the Assise finds it not sufficiently proven by the witnesses that the pannel is art and part of the breaking of the prison, and therefore assoilies him, which they have done not adverting to the design of the Interloqr but

supposing that for making him art and part it was necessar to prove that he had concurred in the breaking.

I remember this verdict did surprise the pursuer's procurators and therefore Mr. William Moir who is one of them is marked protesting for an Assise of Error. The verdict is not unanimous, but by plurality of votes. The rest of the Defenders in this proces were all declared fugitives.

Donald M^cDonald of Cullathie and the remanent brothers of Alexander M^cDonald in Cullathie against Donald M^cNeill and others for the Murder of the said Alexander. The Defender is declared fugitive and Æneas Lord M^cDonald[1] is unlawed for not reporting and not insisting in the said Criminal Letters against Murish M^cpherson of Cloyne and others Defenders concerned in the same proces.

Advocatus agt. James Donaldson, merchant in Elgin, for theft, continued.

Edinbr. 28 and 29 July 1673.

Advo: agt. Robert Russel, prisoner in the Tolbooth of Edinb. for slanderous speeches against the King, and Anderson against Ferguson for beating and wounding, and Traill against Boswell for wrongous Imprisonment, and James Malice against James Archibald, as also John M^cLean against M^cMartine of Letterfinlay, and Chirstian Adam against John M^cNab for severall crimes, all continued.

Edinbr. last July 1673. The Lords present in the Court are Colintoun, Strathurd, Castlehill, and Newbyth preses.

Anderson, baillie of Inverury agt. ffergusons for beating and wounding him when he was a Magistrate.

The said day William ffergusoun of Badifurrow, John and Walter ffergusons his Brothers, are indited and accused at the instance of the King's Advocate, John Anderson, Baillie of Inverurie, party injured, for Menacing and Threatning, assaulting and Beating and Wounding the said John Anderson on the 13th May last 1673 in the house of John Johnstone, late baillie of the said Burgh, and that when the said John Anderson was an actuall Magistrate within the said

[1] Eneas Macdonell of Glengarry was created Lord Macdonell and Aros in 1660.

burgh, having stricken over the head with a pistoll and fastened in his hair.

Mr. David Thoirs for the Pannells alledges that the Dittay in sua far as it bears beating of a magistrate cannot be sustained, because the Pursuer was no magistrate at the time, he never having taken the Declaration conform to the Act of Parl. and oppones the late Interloq^{r} in the case of Provost Aikman against Carnegie of Newgate. 2° As to the blood, alledges denying the Dittay the pannells are all already assoilzied by an Inquest. 3° As to the cuff and beating, the same is also judged, to witt both blood and cuff and beating are judged by the Baillies of Inverury. And tho the cuff and beating were not yet judged, yet the blooding being judged, they are not relevant *per se* a sufficient ground of Dittay before the Justices.

Replys Sir George Lockhart that he oppones the Dittay bearing beating, blooding and wounding of a magistrate, and as to the Complainer's not[1] taking the Declaration *non relevat* seeing he was elected and exerced as a magistrate. And that it cannot be made appear that the Declaration was offered and refused, and if it was omitted it was not upon any accompt of Disloyalty and he is content yet to take it. And besides it were a preparative of very great inconveniencie that persons cloathed with authority, owned and acquiesced to be magistrates, might to the manifest contempt of publick authority, be invaded by private persons. 2° The pretence of *res judicata* ought to be repelled in respect the crime lybelled, being the invasion of a Magistrate does merit a condign and severe punishment, whereas the Decreet produced contains no such punishment, but is patched up by Collusion to the advantage of the pannells who being conscious of the heinousness of their crimes, caused pursue themselves before the Baillie of the Town, who is their uncle, and the Clerk being also an Uncle, and witnesses are adduced who could not prove, and the Decreet does not bear the Assize to have been sworn, and therefore the Justices ought not to regard it.

Its added by Sir George Mackenzie for the Pannells, that he

[1] 'not' omitted in Adv. MS.

oppones that Act of Parl. which enjoyns the taking of the Declaration bearing they should be repute no Magistrates till the Declaration should be actually subscribed *et non relevat* to subscrive now seeing he was no Magistrate the time of the wrong lybelled, *nec relevat* that he was not required to subscrive, ffor he being a Baillie should not only have subscribed but required others to subscrive. And as to his being in the exercise of his office *non relevat* ffor it matters not what he was exercising seeing he was no magistrate. But the truth is the exercise was drinking in a private house.

To the second, oppones the Decreet of the Baillies which bears the Assise and witnesses to be sworn, and imposes 50£ which shall be payed if it be not payed already, and was a pain equal to the offence, their being neither blood nor blae, and the Complainer being no Magistrate as said is. And the Decreet cannot be summarly taken away before the Justices when the parties against whom it is pronounced are not complaining.

The Lords Commissioners of Justitiary ffinds the lybell relevant at the pursuer's instance, he always proving that he took the Declaration and admitts the same to the knowledge of an Assise. Interloqr.

The pursuer for Probation produces witnesses, and first the Schoolmaster of Inverury, and the said John Johnstone, who is ment^d^ in the Lybell, are examined upon that point whither the Complainer did take and subscrive the Declaration. The first depones he both swore and subscrived it. The 2^d^ depones he took it but knows not if he subscrived it, and the Complainer's oath being taken in supplement, he depones that he did both swear and subscrive it which is more then is needfull, ffor the Act of parl. requires not swearing, therefore the said John Johnstone and other witnesses are examined upon the riot it self, and proves it sufficiently.

The Assise ffinds the pannel William fferguson guilty of opprobrious speeches and giving a blow to the pursuer and his brother John Ferguson guilty of striking and throwing him to the ground, which occasioned his blooding, and Walter fferguson, the 3^d^ brother guilty of taking him by the hair of the head.

The Diet being continued till first of August, the Sentence is then pronounced whereby the Commissioners of Justitiary ffynes and amerciats William, John and Walter ffergusones, pannells in £50 Scots, whereof £30 Scots to be payed by William ffergusón, 20 merks by John Ferguson, and 10 merks by Walter ffergusón, to be payed into the Clerk for his Majesty's use, and also ffines and amerciats the saids pannells in the sume of £100 Scots more to be payed to John Anderson, Baillie of Inverury, pursuers as follows, viz. By the said William ffergusón the sum of 100 merks, the said John ffergusón the sum of 30 merks thereof, and the said Walter, the sum of 20 merks thereof out of the first and whereof the saids Lords ordained to pay the witnesses their expenses, and also ordains the pannells to be carried to the Tolbooth till they pay the same, and to remain therein thereafter during the Lords pleasure.

Eodem Die.

John Reidman, skipper in Leith, for the murder and slaughter of David Gray, skipper in Dysart, declared fugitive, and deserted as to Margaret Banks, his wife.

Russel for slanderous speeches against the King, continued.

Mr. William ffraser,[1] minister at Slaynes, declared fugitive for ejecting Mr. William Rob, schoolmaster there, out of his house, and detaining his household plenishing, and his Cautioner unlawed.

James Archibald declared fugitive for the slaughter of John Malice at the Miln of Edinglassie. The Diet deserted against M°Martin of Letterffinlay, for the slaughter of John M°Can vic enteir.

The Diet also deserted against James Donaldson, merchant in Elgin, for false measures and weights.

John M°Nab in Phinnick declared fugitive for the slaughter of Andrew Liddell in Cringlet and his Cautioner unlawed.

Eodem Die.

Henry Boswell and Robert Chapman, Baillies in Kirkaldie,

[1] Ordained prior to 20th December 1665; demitted his charge ('for fear of deposition, being suspected to have had a hand in his wife, Jean Gordon's, death'), which was accepted 6th October 1699.—Scot's *Fasti*, vol. iii. p. 613.

indited for wrongous imprisonment of Alexander Traill, messenger in the said burgh, notwithstanding that the saids Baillies wanted authority, never having taken the Declaration, and that for no other cause but because the Complainer came there and did intimate an Advocation to the Baillies which contained this reason in it, that they were partiall.

H. Boswall agt. the Magts of Kirkaldie for wrongous Imprisonmt

Sir Geo. Lockhart for the Pannells, denyes the Lybell in that part which bears that the Pannell was imprisoned for producing the Advocation, and the contrary is so far evident, in as far as the Pursuer being an ordinary member of the Court, he was admitted thereafter to plead a Cause, and the true Cause was for bygone Cess due by the Pursuer, and to evince this he was sett at liberty upon finding Caution to pay the Cess.

Replyes Sir Geo: McKenzie for the Pursuer (1°) the imprisonment was unlawfull by them as magistrates, because they were not magistrates, not having taken the Declaration. (2°) It was unlawfull because it was *spreta mandato judicis*, because the Advocation was not admitted, ffor if it had been admitted, the Clerk in Style would have written upon it, produced such a day and admitted, whereas it is alledged that the Pursuer was imprisoned for not payment of Cess. It is replied 1° That the Pursuer not being Tradesman nor Landlord, he was not liable in payment nor was ever Cess craved off him. 2° Altho he had been liable, he would not be imprisoned but only poinded for the Cess.

Duplys Lockhart, 1° Offers to prove the Advocation was admitted in swa far as the Magistrates did sist Process upon production thereof, and the Clerks not writing on it cannot fix a guilt on the Magistrates. 2° It is evident that the Advocation was admitted because it was called in the Session the next day. 3° Whereas it is pretended that the Pursuer could not be stented nor imprisoned summarily for Cess, the same ought to be repelled, because the Magistrates might *bona fide* exact from all persons in the Stent Roll, and as to the putting them in the Stent Roll, it was the part of the Stentmasters who act upon oath, and not of the Magistrates. And if the Stent masters were challenged, they could defend themselves, because they offer to prove it was the Custom of the

Burgh to stent Messengers within the same. And also that it has been the custom of the Magistrates to imprison for the Cess or poind at their pleasure, and so the Magistrates having precedents before them, they might very well proceed to imprison yet *quælibet causa etiam fatua excusat a crimine*, and much more ought the custom of a Burgh to excuse, seeing an inviolable Custom is sufficient to prescrive in civil rights. And farder if need bees its offered to be proven that before the Magistrates offered to imprison they used all diligence to poind but fand the Pursuer's doors always shut. And as to the pretence that the Magistrates had not taken the Declaration, it is offered to be proven that the Pursuer was imprisoned by Order of Baillie Boswall who had taken the same.

Triplys Mckenzie, That the Pursuer was imprisoned by warrand of both the Baillies and both of them had not taken the Declaration, swa that the other Baillie must be repute as an usurper and to have walked illegally. And to the pretence that the Pursuer as a Messenger ought to be liable for Cess, oppones the Custom of Edinbr. where no Messenger is made liable for Cess, and which ought to be a rule to all other Burghs. And suppose by the rule of Edinbr. messengers were liable. yet it was never without a previous sentence, and it is absurd to pretend 40 years custom seeing Cess has not been 40 years in use. And suppose there had been 40 years custom yet that cannot make a rule except it be alledged that the Custom was quarrelled and found legall, and if it were otherwise it would open a door to all arbitrariness, and there is no hazard to his Majesties Service, since Poinding and quartering are found sufficient remedys.

The Lords Commissioners continue the Diet till the morrow, being the first of August, and on the said first of August they continue it till the 2d of November, and causes the Baillies find caution of Lawburrows to the Pursuer, he having given his oath that he dreaded them bodily harm.

Eodem Die.

Robert Russell, prisoner for Slanderous Speeches agt. the King, again continued till the 3d of September next.

William fferguson and some other soldiers of the Earl of Errolls Regiment, indyted for the slaughter of Andrew Keith, servant to the Lady ffraser, again continued, and an order direct to the Sherriff of the Shyre to apprehend the Witnesses.

The Sentence Anderson, Baillie of Inverury against ffergusons, is here sett down, but wee have related it formerly beside the Process.

William Grant in Innerlochie and a great many Highlanders declared fugitives for a Rape committed be them against Beatrix Gordon, daughter to Mr. Alex[r] Gordon,[1] minister at Kirkmichael in Strathaven, and the Expences modified to be payed be the Pursuer.

THE BOOK of ADJOURNALL beginning the 4th August 1673, and ending the 12 March 1678.

Edinb. the s[d] 4th August, present in the Court the Lo. Colington, Nairn, Castlehill, Newbyth and Craigie. Castlehill chosen Preses.

Wm fferguson of Badifurrow and his Brothers sett at liberty.

The which day William fferguson of Badifurrow and his Brothers having consigned their ffines in the Clerks hands imposed on them for beating John Andersone, Baillie of Inverurie, were sett at liberty upon their Petition *vide* 5th August.

Eodem Die.

Advoc. agt. Ro[t] Robertson, soldier for a Duel and slaughter.

Advocatus agt. Ro[t] Robertsone, souldier and now prisoner in the Tolbooth of Edinburgh indyted and accused for appointing a single combat with W[m] M[c]Clellan, Soldier in the Lord Kellie's company, upon the 27th of June last by past, at the Craigs at the Back of the Canongate, about 5 or 6 a clock at night, where he gave the deceast William a thrust in the Bellie, two inches beneath the navel with a Rapper Sword, of which thrust he immediately died and swa was murdered and killed by the said Robert in a Combat whereof he is actor art and part.

[1] Ordained before 1st April 1651; died 14th January 1685.

Mr. John Ellies for the Pannell Alledges (Denying the Dittay) he cannot go to the knowledge of an Assize because its offered to be proven the slaughter (if any was) was committed *Salvo moderamine inculpatæ tutelæ*, in swa far as ye Defunct did draw the first sword and did menace and threaten the Pannell to fight, which is a qualification of self defence sufficient to elide the Lybell.

Replyes Advocatus, that tho oppones the Dittay wherein its lybelled that the Defunct was killed in a single combat, sett and appointed in the place lybelled, which holds out a design to kill, and it is impossible there could be such a design and yet Self Defence *cum moderamine inculpatæ tutelæ*, and by the Act of the parl. *anno* 1600,[1] the going to a Duel is declared a Capitall Crime, tho murder should not ensue upon the same. And the pretence that the Defunct did first draw a sword is not sufficient to inferre Self Defence, seeing *Inculpata Tutela* is only in that case where the killer would not otherwise evade, but here he might have invaded by not going furth, and the quarrel being made near the Guard, he might have gone away, and there are two of the same company debarred who were at the field with the pannel, and could have interposed if he had not designed to fight.

Duplys Eleis, that the Defence stands relevant notwithstanding of the Reply, 1° because in so far as the lybell is founded upon the Act of Parl. against manslaughter and murder, the qualifications of Self Defence condescended upon are sufficient to excuse the Pannel from the pains and penalties contained in the saids acts seeing the Defender does condescend that the Defunct did not only threaten and menace him to fight, but did proceed and did draw his sword and did threaten to do acts of violence therewith, and which Acts of Violence no person far less one in a military capacity and a soger was bound to evade by fleeing or turning the back, which at the time lybelled was impossible for him to do, the danger being

[1] The Act is 1600, c. 12, by which to engage in a duel was made a capital offence, although no injury to the parties followed the encounter. By 1696, c. 35, the sending or accepting of a challenge was punished by banishment and escheat of moveables,

imminent and a manifest danger in the flight, he being at least a quarter of mile from the Guard, and the Defunct being known to be a quarrelsome and bloody person, much stronger and elder then he was. 2° In so far as the Lybell is founded upon, the Act of Parl. 1600 anent Dueling the forsaid Defence stands relevant, notwithstanding thereof, because the Act of Parl. does only relate to persons who fight Duells and must only be understood to extend to those who having given or received Challenges doe persist and go to the place with an intention to fight, and accordingly does fight without refusing or relenting, so that *esto argumenti causa* the pannel upon high provocations given to him by the Defunct, which he did refuse and resist for many days together, had gone to the Craigs with him, yet having repented him upon the place, it was lawfull for him to have resiled, likeas *de facto* he did resile and refuse to fight, but being forced thereto by the Defunct, it was necessar for him in his own Defence to draw his sword, ffor as it cannot be controverted on the one hand if both parties having come to the field and repented and gone home again, the naked going to the field could not have brought him under the compass of the law, so on the other hand, the pannel being the partie provoked and injured, and having repented and resiled upon the place, he does not fall under the compass of the Act of Parl. anent Duells, but being pursued and invaded by the Defunct, must have the benefit of the common law of Self Defence, which is also relevantly and pregnantly qualified in this case as in any.

3° The Dittay as to the Challenge given or received, and appointment made, is not speciall, but only bears in generall that William M^cLellan was killed in a Combate, which is not sufficient, ffor if it were speciall the pannel might have speciall Defences to elide the lybell whereof he is precluded by the generallity.

Sir George M^cKenzie adds to this Reply that the Defence is not proponed to liberate the pannel from all punishment, but *a pœna ordinaria tantum.* ffor tho the pannel had exceeded *moderamine inculpatæ tutelæ*, yet his excess makes him only liable *in pœnam extraordinariam excessui commensuratam*, as if a person should not flee when he may, his not flying will not

inferr the pain of Death. And in this case there was no malice nor previous design, forethought fellony or challenge given or accepted nor swords chosen or weapons condescended on, which are the ordinary requisites of a Combate, buton the contrary, there were different weapons, for the pannel had a rapier and the Defunct a broad sword. Likeas to take off all suspicions of a Combate, its offered to be proven that upon the field the pannel refused to fight and told the Defunct that his weapon was unequall to the pannells, and was threatned by the Defunct and begged his peace, and that the Defunct refused and threatned to strike the pannel, and that he was a cruel man *et minas exsequi solitus*, having killed and wounded several persons before, so that the pannel did nothing but defended himself, and to evince his innocence he came back to the Guard and told his comerades that he had killed the Defunct, and was forced to it, and as to his going to the place of the fight, it is not *per se* relevant to inferr a Combate tho the fight and slaughter followed, seeing there was neither Seconds nor previous choosing of weapons nor a voluntar fighting in the place but a meer force upon the pannel as said is.

Triplys My Lo. Advocate, that he oppones the Dittay and his former Replys, and whereas its pretended that the Defunct did threaten the pannel and was of greater age and strength and used to quarrel and fight, and that the pannel was unwilling to go to the fields, and that he was a soldier and not obliged to flee, the said pretences are so far from being grounds of Defence that they are aggravations of the Dittay, ffor no soldier entertained upon publick pay to defend the King's Leidges should kill any of the leiges. And both parties being soldiers in one and the same Regiment and Company, they should have applyed to their officers for redress of wrongs and ought not to have taken revenge at their own hand. And the pannells going to the field against his will demonstrates that he went *veniente conscientia*, knowing that both soul and body was in hazard and that the Defunct was in the same danger. And he having killed him out of hand, he did what in him lay to kill the Defunct's soul. And the pretence that the pannel might have resiled or did resile in the fields, is most irrelevant, seeing *non destitit* but did fight and kill,

and for this cause it cannot. be presumed *quod destitit*, and it cannot be proven by the two soldiers who were present, because they were ingaged in the same quarrel. As also the pannel did never before now pretend self defence, but on the contrary being examined in the presence of the Earl of Linlithgow his Collonel and a privy Counsellor, and the Lord Newbyth, one of the Judges, he confest his crime without any such qualification, and declared that he was convinced of his guilt and penitent, and claimed no more favour but that he might not dye as a Thief, and be hanged. And whereas it is pretended that a Duel is not sufficiently qualified, and that the Act of Parl. is only to be understood of formal Duells upon previous Challenges, and when the persons to fight condescend upon the weapons and such like formalities, and that the qualifications forsaid are not proponed to exempt the pannel altogether from punishment, but only a *pœna ordinaria*, its answered that the Dittay and Act of Parl. are opponed, and it shall be clearly proven that their having proceeded a quarrel betwixt the pannel and the Defunct a day or two before the pannel was again desired by the Defunct to go with him to the fields, and that he was willing and did go and killed in manner lybelled, and in construction of Law its a Duel where parties having or pretending to have quarrells, goes to the ffields of purpose to determine them by way of fight, although there be no previous challenge or other formalities of a Duel. And the Act of Parl. does not require these previous formalities, yet if need bees a previous challenge will be proven and therefore the pannel should be punished *pœna ordinaria* and the Judges have not power to mitigate in the case of casuall Homicide or Homicide in defence. And furder there is no necessity to debate in this case, whether or not the parties did *de facto* desist or repent after they were engaged in a Duel, seeing the fighting of a Duel tho Slaughter should not follow, is by our Law a capitall crime. And as to that circumstance of the Duply, that after the Defunct was killed, the Pannell came and told the Guard, it is no argument of his innocence but was the effect of the horror of his conscience, and the reason why he came back was because it was impossible for him to escape, in respect there was three other persons in company with him, who neither durst nor would let him escape.

Advoc: agt. Robertson, Soldier, for a Duel and Slaughter.

Interloq^r^ The Lords Commissioners of Justiciary ffinds the Indytement relevant notwithstanding of the Defence and Duply, and remitts the same to the knowledge of an Assise, whereupon the King's Advocate takes Instruments.

After the Assize were chosen and sworn, the King's Advocate declared, that he would use no other probation but the Pannell's own Confession, whereupon Mr. John Elleis, Advocate for the Pannell, took Instruments, and then the Justices continued the Diet till tomorrow, and I find it is afterwards continued from Dyet to Dyet.[1]

Edinbr. 5 August 1673.

The Lords Commissioners of Justiciary upon a Petition presented to them by some of the name of M^c^pherson, Grants criminall Letters for citing some of the name of M^c^Donald in Lochaber, at the head Burgh of the Shyre, where they usually reside, in respect they are vagabonds, having no certain residence, and no safe access may be had to them.

Eodem Die.

Severall absent Assizers in the Action the Town of Aberdeen against Irvine of Hilton, having given in Petitions, are excused and the Clerk discharged to book their unlaw, and the Town is ordained to pay the expense of the Witnesses.

The same day the Petition given in by John Anderson, Baillie of Inverurie, for getting up the ffines consigned in the Clerk's hands by the ffergusons persued by him, the Lo: ordained as much to be given up as would pay the Witnesses, notwithstanding of an Arrestment.

Edinbr. 3d of Sept. and 3, 10 of Nov^r^ 1673.

There is nothing in the said three Diets but new Continuations of Diets which either have been continued of before or which comes to be called in the next Dyet following.

11 Nov^r^ 1673.

After new Continuations of some of the same things,

[1] This case referred to by Burnet in his *Criminal Law*, and the debate as here given quoted at considerable length.—W.

Cathrine Alisone, Servitrix to the Countess of Queensberry is declared fugitive for Usury, committed by her in taking a Band of £100 Scotts from Barbara Logan, Relict of Mr. George Cleland, Minister at Durinsdeer, and Robert Cleilland of Castle Robert, containing an obligement to pay 10 for the 100.

Eodem Die.

Alexander Webster in Leidside, for Deforcing Rob^{t} Stewart, Messenger, declared fugitive.

Sir Alex^{r} Balfour of Dunmill and the remanent nearest of kin of Sir Robert Balfour of Dunmilne reports the Criminall Letters against Sir James M^{c}Gill of Rankeillor for the Slaughter of the said umq^{ll} Sir Robert, by thrusting him through the body with a Rapper, upon the Commonty of Newburgh in ffyfe, as he was travelling to his own house, upon which the said Sir James M^{c}Gill is declared fugitive, *vide* 14 January 1678, where a Remmission is recorded. Sir A. Balfour agt. Sir Ja. M^{c}Gill for Slaughter.

Sir Charles Erskine of Cambo,[1] Knight, Lo: Lyon, and Alex^{r} George, Messenger, agt. ffrancis Duguid, elder and younger of Achinhuif, Margaret Young his Daughter, John Gordon of Tillachnoudie, and divers others for Deforcing the said Messenger in the execution of a Caption at the instance of the Bp. of Aberdeen against the said Tillachnoudie for ffeu Duties, *anno* 1672, deserted. *Vide* 1 December the said year, wherein this Process is insisted in and debated.

Edinbr. 13 November 1673.

The Mutuall Actions Mr. W^{m} Aikman, Advocate,[2] against the Magistrates of Arbroth, for wrongous Imprisonment, and they agt. him for Deforcement of their Town Officer, when he was apprehending him for payment of a Bloodwitt imposed by the Magistrates for beating their servant, both deserted, and the Town are ordained to pay the expence of Witnesses cited by them only, and as to the expence of the Witnesses cited by both parties, the same is divided betwixt them.

[1] Brother of the second Earl of Kellie. Lyon King 1663; baronet 1666; died in 1677. His descendant (eighth baronet) succeeded as eighth earl in 1795.

[2] Admitted 1672. Died 1699.

Edinbr. 17 November 1673. The Commissioners present are Colington, Nairn Preses. Castlehill and Newbyth.

Haitley agt. John ffraser, Writer in Edr. for Adultery.

John ffraser, Writer in Edinbr. indyted for the Crime of Nottour and manifest Adultery committed by him contrary to the Acts of Parl. in so far as he being married upon Margaret Haitley, Pursuer, in the year 16.., and having after his marriage with her, dwelt and cohabite with her, and having had divers children with her, yet contrary to the Law of God, and the saids Laws and Acts of Parlt and the oath made by him at the said marriage, he the said John in the year 1668, 69, 70, 71, 72, and 1673 years, and in ane or other of the saids years and months of the same, has committed Adultery and has had carnall Dealling and kept company in bed with Helen Guthry, notoriously known, and that the said John and Helen might have the better pretext and colour for these wicked practises, they imposed on the Ministers of Edinbr. and by production of a false Testificate, bearing that the Pursuer, first wife to the said John, was dead, the said John did procure liberty to marry the said Helen Guthrie, and tho he knew that his first wife was alive and that she was come to Edinbr. yet the said John did continue and persist in his wickedness in keeping bed with the said Helen, in doing whereof he is guilty of the crime of nottour and manifest Adultery and ought to be punished therefore with the pains contained in the Acts of Parliament, that is the pain of Death, the proposition of his Dittay is founded upon the 105th Act, 7 Parl. K. Ja. 6, whereby it is statute that it shall be judged in Law nottour and manifest Adultery worthy of the pain of Death, when persons, adulterers, keep company and bed together nottoriously known.

Sir Geo: Lockhart for the Pannell, John ffraser, Alledges the Dittay cannot be put to the knowledge of an Assize, because it acknowledges that the Pannell was married to Helen Guthrie by a warrand from the Presbetry of Edinb. upon production of a Testificate that the first wife was dead in Virginia and there was lawfull proclamation of Banns before the marriage. And albeit the first wife, who is now returned, may question this marriage as to civil effects, and may compell the Pannell to adhere to her, yet an simple rumour with any

circumstances of probability that the first wife was dead, and much more Testificates under the hand of famous persons, are sufficient by the opinion of all Lawyers to excuse from the crime of Adultery, even tho the 2d conjunction had been without all solemnitie of marriage and warrands of the Presbetry which allowed the Banns to be proclaimed.

Replys Sir George Mckenzie for the Pursuer, that the first Marriage being acknowledged to have been solemnized, it could not have been dissolved but by death, and that Death behoved to be legally proven, and rumours of Death are not sufficient nor Testificates, for any person being desirous of a 2d marriage, may raise a rumour himself, by making a woman call herself by the name of his wife when she was going to a Plantation, and therefore the Death should not have been proven by Testificate but by Witnesses, who should have appeared and been interrogate if they knew the woman who was alledged to be dead and knew certainly that she is dead, and what cause they would give for their knowledge, and tho rumours, and Testificates were sufficient, yet they behooved to be founded on just probabilities and grounds, which could not be here, since the witnesses did not depone that they knew Margaret Haitley, the supposed Defunct, to be the Pannell's wife, and tho some credite may be given to Rumours where there is no certain contrary probation, yet no respect can be had in this case where the Pannell was not in an invincible ignorance, never having done exact Diligence to know the ground of the rumour, of which by pains he could have very easily cleared himself, seeing he had relations in Edinburgh who could inform him, and it is offered to be proven that she lived in places openly known with her friends, and was known to the whole countrey round about by the name of Margaret Haitley and lived within 20 miles of the Pannell's ffather's house. Likeas to show his formed's design of disowning her, when she returned to Edinburgh, he was asked by the ministers if he knew her. He said no, whereas every one of her acquaintance knew her.

Duplys Lockhart, that he oppones his former Defence that *quoad affectum dissolvendi Matrimonij* by Divorces and in Processes of Adherence, there should be a full clear and legall

that place where she is said to have lived, being in the Sherriffdome of Murray, the Pannell who lived in Edinbr. might have been ignorant of her, and it is very probable she obscured herself of purpose to draw the Pannell her husband in a snare, seeing she has lurked 4 years after her marriage without looking after him. And whereas it is alledged that if such Testificates were sustained, marriages might be prejudged and Adulterys palliated, Mr. Laurence Charters answers, that this is of no weight unless the Pannell had procured the Testificates when he knew she was living. And where it is pretended that he ought to have taken pains to inform himself, it is answered that to purge the crime of Adultery it is sufficient to say the Pannell knew not, ffor without knowledge they could not be *dolosa sine dolo malo adulterium non committitur* as is expresly decided in L. penult. *ad l. Iul. de adulteriis.* The words are, *Si ex lege repudium missum non sit et idcirco mulier adhuc nupta esse videatur: tamen si quis eam uxorem duxerit, adulter non erit*, and the reason sett down is *quia adulterium sine dolo malo non committitur*, for in all these crimes *Animi destinatio cogitatur, ut in L. eod*, and it is offered to be proven that the Pursuer's mother and sisters were at Edinbr. the time of the Proclamation, and conversed with the Pannell. And yet it cannot be signified that they signified anything to him of the Pursuer's being alive or of their dislike of the 2d marriage.

Haitley agt. Jo. ffraser Writer in Edinburgh for Nottour Adultery.

Sir Geo. McKenzie adds to his former Debate this separate Alledgiance and offers positively to prove it, viz. that the Pannell has cohabite with the 2d wife since he knew the first wife was alive, as man and wife uses to do by going in to her at night and coming out in the morning, as he used to do at other times, and that she staid with him whole nights in his chamber in the Tolbooth of Edinbr. when he was imprisoned by the Magistrates upon account of marrying her. 2° Offers to prove that lawfull intimation was made to him of his wife's being alive when he made this marriage, viz. by Captain Hamilton's wife and Gavin Sangster's wife, and by Captain Patersone, to whom he answered that tho there were nineteen wives she should be the last. 3° Tho the Testificates could defend him against the ordinary punishment, yet it cannot defend against arbitrary Punishment.

Mr. David ffalconer Replys to the first member of this Alledgiance, 1° Converse with the 2d wife after he knew that the first wife was alive *non relevat* unless the 2d marriage had been reduced. 2° Converse *per se* without bedding together *non relevat* to infer the crime and pains lybelled. 3° His knowledge is only probable *scripto aut juramento*. And to the 2d member bearing that he was told of his wife's being alive by the persons thereinmentioned. It is replied he was not obliged to believe them seeing they might have said so out of malice, and he oppones the former Testificate bearing she was dead, which was granted by persons of more reputation, and oppones the Proclamation of the Banns and the other presumptions of her death arising from the Mother and her Daughter their concealment of her being alive, and not only did they conceal, but it is offered to be proven that they severall times received the Pannell and his wife kindly in their family and employed them as their agent, which gave him sufficient ground to believe that she was dead.

The Lords Commissioners of Justiciary continues this Diet till Monday next being the 29th instant and thereafter from Diet to Diet untill the 12th of January 1674 at which time they repell the Defences proponed for the said John and remitts the Lybell to the knowledge of an Assize. And the same day the Assize by plurality of votes ffinds him guilty of the crimes lybelled. Verdict.

This verdict tho it be of the date the said 12th of January, yet it is booked the 13th. In these two Diets, viz. the 12th and 13th there is a Process of Reconvention at the instance of the said John ffraser against the said Margaret his wife, for Adultery committed by her, whereof she is also found Guilty. I referr it to the Process.

> I have perused the Testimonies of the Witnesses, led against John ffraser, and I find nothing proven but that they were married and lived together as man and wife, by calling other Husband and Wife, and keeping company together, but nothing proven of their bedding together, and there was no children procreat betwixt them, and yet the Assize finds them guilty of Nottour Adultery, which they have done simply upon their marrying and conversing together as man and wife.

In the same Process and at the same 12 January 1674 there is this following Debate anent Women Witnesses, which I thought fitt also to sett down here beside the rest of the Process.

Debate about Women Witnesses.

Sir Geo: M^cKenzie craves that Marion Orr and the other Women Witnesses may be examined.

Mr. David ffalconer Answers, That she being a Woman and the Crime pursued being manifest and Nottour Adultery, she cannot be received.

Sir Geo. M^ckenzie Replys, That she is not craved to be examined *quoad cohabitationem*, which is nottour, but only *quoad copulationem*, which is occult.

Mr. Laurence Charters Duplys That Women cannot be received in the case of Adultery but where probablie other Witnesses could not be present as in the case of Prison where there were none but women witnesses, and in Lupanaries.

The Lords Commissioners of Justiciary sustain the objection and Repells the Women from being Witnesses in this case.

John Crawford, Chamberlain of Howmains, being called on the said 17th of November 1673 to report the Criminall Letters, raised at the instance of James Adamsone and John Johnstone of Elsieshiells and others, he is unlawed for not reporting conform to his Bond of Cautionrie.[1]

Eodem Die.

Robert Purse, soldier in Captain Windram's Company, being imprisoned for accession to the killing of William M^cclellan, soldier, in respect he was present there, gives in a Petition shewing that his presence was but accidenter, and that he endeavoured to separate him from Robert Robertsone, who killed him, as appears by the Depositions of the Witnesses previously examined in the said matter and therefore craves to be sett at libertie upon his Captain becoming Cautioner to present him when called for, which Petition the Lords Commissioners grants.

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[1] This paragraph not in Adv. MS.

Edinbr. 19 November 1673. All the five Commissioners of the Justiciary present, the Lo: Newbyth, Preses.

The which day James Pettigrew, sometime of Sutterhouse Edgerton Snow, Residenter in Haggs, and other three persons, are indyted and accused, that notwithstanding by the Laws of the kingdome, the Convocation of the Lieges, to the usurpation of the King's Authority, in holding of Courts and execution of sentences pronounced in such unwarrantable Courts, and the troubling of the Lieges in the possession of their Lands and Jurisdictions, are crimes of a high nature, and severely to be punished. Nevertheless the forenamed persons upon the 14 of Aprile last, did hold Courts upon the Lands of Newton, pertaining to Mr. Patrick Oliphant, and fenced the same in the King's name, with Convocation of the Liedges, and cited the Tenants thereto and unlawed them for absents, and gave Decreets against them for the Maills and Duties, and that without any Precept from a Clerk, did poind them and break open their doors and extorted Bonds from severalls of them for sums of money.

It is alledged by Sir Geo: Mckenzie for the Pannells, 1° The Pannells cannot pass to the knowledge of an Assize as Usurpers of the King's Authority by holding of Barron Courts upon the Lands lybelled, because anything they did in this matter was by virtue of sufficient rights flowing from the Lady Tercer, their Cedent, who has the same right to hold Courts for her third that the Heretor has for his two parts for payment of the Maills and Duties of her third, and this they might have done by virtue of their right in their own names, without making use of the King's name. Likeas the Pursuer, Mr. Patrick Oliphant, has no interest to pursue for any Injury done to his Tennants without a Warrand from them.

Oliphant agt. Snow, etc. for Oppression.

Replys Mr. William Monipenny, the Defence is no ways relevant as founded upon the right of the Lady Tercer or her husband, unless it were alledged that they were infeft in the same Lands *cum curijs*, for *esto* that she were kenned to a Terce that cannot give her a Third of the Jurisdiction which is *Jus indivisible* where it is divided, is only transmissable by infeftment, and all the right she can have by her Terce is a Title to pursue before a competent Judge. 2° She is denuded of

her Terce by a Tack and could not poind for Duties in prejudice of the Taxmen, and consequently none having right from her could do it. 3° *Esto* she had Jurisdiction, she ought to have exercised the same in an orderlie way and ought not to have convocate Soldiers and break open doors in order to poinding, and her Decreets of Poinding could be no Warrand for this, and Mr. Patrick Oliphant has sufficient interest to pursue without concourse of his Tenants, in respect the injury is done to himself, he being infeft and in possession of the said lands.

The Lords Commissioners of Justiciary ffinds the Lybell as it is conceived not relevant and refused to sustain the same in respect of the Defence and notwithstanding of the Reply made thereto, and reserves action to the Pursuer for Dammage and Interest before the Judge Ordinary.

Edinbr. 21 Novr 1673.

Alexander Traill, Messenger in Kirkaldie, agt. Hendry Boswall and Robert Chapman, Baillies thereof, for wrongous Imprisonment, deserted.

Edinb. 24, 25 and 26 Nov. 1673.

In these three Dyetts, nothing but Continuations of some Processes for short time, which will come in afterwards except these following particulars, viz.

The said 25th day Murish Mcpherson of Clyne and severall others of that name and their followers being conveened at the instance of some of the name of Mcdonald for the Slaughter of Alexander Mcdonald in Collachie, Brother to the Pursuers, in the month of January 1672. They are declared fugitives.

The said 26 day the same McDonalds being conveened by the same Mcphersons, for convocating 80 men in Arms, invading the Pursuers and fyring guns among them and wounding Ewen Mcpherson by a shot in the thigh, and Angus Mcpherson by a shott in the hand, by which he is mutilate, the Dyet deserted in respect of this Defence proponed by Mr. David Thoirs, that the Letters are only produced by Mr. Alexr Andersone,[1] Advocate, who craves that the Defenders

[1] Admitted advocate 9th December 1665.

may be declared fugitives, but shows no Warrand to produce the Letters, which he ought to show in this Case, in respect that the Letters are only execute by Dispensation at the Mercate Cross of the Head Burgh of the Shyre where the Defenders live, and none of the Pursuers are personally compearing, nor any having their Mandate, nor does his Majesties Advocate compear by himself or by a substitute, in respect whereof the Justices deserts the Dyet against the haill Defenders. Whereupon Mr. Da: Thoirs their Procurator asks Instruments and protests for the relief of Eneas M^{c}donald, Writer in Ed^{r}, Cautioner for their appearance, which Protestation the Judges admitts, and Duncan M^{c}pherson of Clunie, Cautioner for insisting in this Pursuit, is unlawed.

Edinb. 1. 2. 3. 4. 5 and 8th days of Dec^{r} 1673. All the five Commissioners of the Justiciary present, Lord Strathurd Preses.

This Dyet begins with four Continuations to wit, Keith agt. E. Erroll's Militia soldiers for slaughter.—Preston agt. Bothwell for cutting of Green Wood.—Ld. Advocate agt. Russell for Slanderous Speeches against the King—and against M^{c}cleod of Assint for Treason.

Eodem Die.

Intran ffrancis Duguids, elder and younger of Auchinhoove, Margaret Young, spouse to the said ffrancis Duguid, elder, Margaret Duguid his Daughter, Jo: Gordon of Tullichoudie and divers others, all and every one of them, indyted and accused, that albeit be the 84 Act 11 Parl. and the 150 Act 12 Parl. K. Ja. 6th the Deforcing of Messengers or Officers, are severely punishable by escheating of their moveables and such arbitrary punishments as shall be found suitable to the said Crime. Nevertheless Alex^{r} George, Messenger, being employed to execute a Caption at the instance of Pat. Bp. of Aberdeen against the said John Gordon of Tilliechoudie for certain Debts owing by him to the Bishop, and having upon the day of June 1672 gone to the house of Alex^{r} Coutts in Tillichnoudie in order to the execution of the Caption,

the said John Gordon of Tillichoudie and the other persons @named did sett upon the said Messenger when his Blazon was on his breast, and did oppose and beat him and fastned in his hair till the Rebell made his escape, and the said ffrancis Duguid, elder, being standing by at the time the said Messenger required him to command the said persons, who for the most part were his children and domesticks, to desist from the violence to the Messenger and to assist him in the execution of his office, which he refused to do, and furnished the Rebell with his own horse and saddle, whereby he made his escape. As also the said ffrancis Duguid, younger, did pull back the Messenger from the Door of the House, where the Rebell was, and thereby hindered him to apprehend him, and being challenged by the Messenger for doing so, he answered that he cared not what he did, for he had but little to lose, by the which Crime of Deforcement the forenamed persons, being actors airt or part etc.

Achinhoove elder and y^r^ for Deforcement.

Sir Andrew Birnie for the Pannells Alledges, that the Lybell is not relevant in so far as it is blank in the place where the Deforcement should have been committed, whereby the Pannells are deprived of their Defence of Alibi. 2^o^ the Lybell does not condescend upon an Order given to the Messenger for executing the Caption be word or Write from the party, which ought to be otherwise, Third, Parties may extract Captions off the Signet and put them in the Messenger's hands to be execute without the knowledge of the Parties interessed, which is absurd. And it cannot be pretended in this case that either the Bp. of Aberdeen delivered the Caption or gave orders to execute it. 3^tio^ The Messenger did unjustly offer to execute the Caption, and the Defenders cannot pass to the knowledge of an Assize for deforcing him, because it is offered to be proven, how soon the Caption was presented and shown Duguid of Auchinhoove elder, ffather in Law to the Rebell offered to pay the Debt and expences instantly, and if need were to present the Rebell to the Mesg^r^ when he should be called for, and since syne the Debt is paid to the Bishop and Discharge reported, and he has declared under his hand that he gave no Warrand to this Pursuer to execute the Caption, and that always when he gave Warrands to Messengers in

such cases, he ordered them to sist execution if either the Parties should make payment or offer sufficient security for his satisfaction and the Exchequer does no more for the ffeu Duties belonging to the King when they employ Messengers.

Replys Mr. John Elleis for the Pursuer, that he oppones the Lybell which is as relevantly qualified as any like Lybell uses to be, and which expreslie condescends on the place of the Deforcement to have been in the House of one Coutts of Tilliechoudie, if the Pannells will propone their Defence of Alibi, they shall have an answer. 2° It imports not whether the Bp. gave Warrand to execute the Caption or not, ffor the Caption being in the Messenger's hands, it was a sufficient Warrand, and it cannot be supposed he would have put himself to the trouble to execute a Caption without a Warrand. 3° The Messenger being the King's officer and not the Bishop's ffactor, he was not bound to accept of money or the Transactions mentioned in the Defence, but his duty was to execute his Letters, and to the pretence that the Debt is discharged and Declarations recovered from him, that the Bishop gave no Warrand to the Messenger to execute the Caption, it is replied that the Messenger was not bound to take Nottice whether the Debt was discharged or not, but having the Caption in his hands, he was bound to execute it against the Rebell so long as he continued Rebell, and if such pretences were found relevant, it would lay down a compendious way to evite all Process of Deforcement by making up antedated papers betwixt Debitor and Creditor, to the prejudice of the King

Replys Sir Geo: Lockhart, That Deforcement being nothing else but a legall punishment of such as dissapoint the just execution of the King's Laws and payment of Parties. There can be no Deforcement in this case because neither does the Partie complain, nor was he prejudged, nor was it the intention of the Bp. of Aberdeen to refuse payment or surety being offered, but on the contrary the Bishop having gotten Caption upon his Generall Letters for his ffeu Duties, and Tilliechoudie being Debitor among others for 600 merks of ffeu Duty, the Bp. did employ Robert Stewart, Messenger, to execute this Caption or to get Security for the said sum, and the money was prepared by Tilliechoudie and put in his

ffather's hands for that use, notwithstanding whereof, another person not interessed, did without any Warrand from the Bishop or Robert Stewart, upon a design of Malice to satisfie a third partie who was not concerned, took the Caption from Robert Stewart, and employed Alexander George, Messenger, at least the said Alexander George was the person who took the Caption from Robert Stewart, and having pursued Tilliechoudie, he offered instantly to find Caution or go to prison, both which were refused, as the Defence bears, which being the true state of the case, it is contended that the Pannells cannot be here liable to the punishment of Deforcement more than if I had a Caption against my brother lying on my table, and a Messenger takes it up and executes it without my Warrand, my brother in that case deforcing for want of my Warrand to execute the Caption against him, could never be punished as a Deforcer, so that a Warrand must be proven or else no man can be in security with Messengers tho they transact with principal Parties. 2° The offering of the money is joined to defend against the Punishment lybelled, especially seeing what countrey Gentleman in Scotland could have thought but there was no wrong done to the Mess^{r} when the money was offered with Caution at appear at any Prison, and no bodily hurt done him, ffor in such cases tho' the contrary were, yet ignorance of such a punctilio is sufficient to defend from any punishment, but that which follows from it is, that the Messenger's Discharge was not sufficient to defend against a civil effect, ffor tho' the Messenger was not obliged to receive the money, yet payment or offer is the ultimate obedience to the King's Law, and where obedience is offered there could be no mind to disobey or contemn, and it will be very hard if a Caption should be stollen out against any person as is usuall or against a Judge or Officer of State, that he should be compted a Deforcer where he offers to pay and refuses to go to Prison, and therefore in respect there is no contempt nor disobedience, the Crime inferred from a quirk in lawe which no gentleman in Scotland could have known, the Pannells ought to be assoiled.

Interloquitor. The Lords Commissioners of Justitiary Repells the Defence and Duply, in respect of the Lybell and Reply, and Deserts

the Diet against the Wife and Daughter of Auchinferdel of consent of the Pursuer.

By this Interloquitor these three heads of the Debate are decided, first, that my Lord Lyon, and the Messenger who was deforced may pursue this Deforcement without concourse of the Creditor, at whose instance the execution was used. 2° That a Messenger having a Caption against a Rebell, he needs not any other Warrand but the delivery of the Caption to him, and it is not a ground to deforce him that he wants a Warrand. 3° Tho the Debt of the Caption be offered to the Messenger, he is not obliged to accept it and desist from execution and cannot be legally forced if he refuse. Three points discust by this Interloqr.

Mr. Alexander Birnie farder alledges for Auchinferdel, that the lybell is not relevant as to him, in so far as it bears that he refused to give his concurrence in the putting of the Caption to execution against the partie Debitor, in regard that the said Auchinferdell is neither Magistrate nor Officer of Arms, to whom the Letters could be directed. 2° The lybell is not relevant in that other part which bears Auchinferdell to be guilty of Deforcement, because he lent his horse to the Rebell, his son in law, that being no deed of violence. Debate anent Auchinferdel.

Replys Mr. John Eleis, that he oppones the lybell, which is most relevantly conceived against the said Auchinferdel, upon this head, that the persons present at this Deforcement, were only himself and those of his ffamily and following whom he might have commanded and restrained, and yet did not refrain when he was required, and the Law puts a difference betwixt crimes committed by single persons and such as are committed by ffamilys, and number of people being linked together with relation of superiors or inferiours. And tho the Caption be only directed to Magistrates and officers to assist in the execution thereof, yet it has this effect as to a master of ffamily or superiour as to oblige them, at least to command them to desist from opposition. And to the second member of the Alledgeance, it is replyed, that the lending of his horse to the Rebell, whereby he made his escape, is sufficient to make him *particeps criminis* tho the Rebell was his Good Son, ffor the law makes every person to be *socius criminis qui opem vel consilium fert*, and the Acts of Parl. on which the Dittay are

founded, do statute against such as demolish and trouble the Messenger in the execution of his office, and he who helped the Rebell to make his escape, is certainly guilty of this by lending of the horse to the Rebell. And whereas its pretended that the lending of the horse was no deed of violence, it is replyed, that where a number of people concurrs in a Deforcement, it is sufficient that some of them use violence or threaten, and it cannot be supposed that all of the number can use the same acts of violence, but if some of them use violence, the rest (while the Messenger is by the said acts of violence detained), concurr to make the Rebell's escape, as was in this case, those who concurrs to make the escape are as guilty as those who do use the violence, and specially Auchinferdel must be guilty, because those who used the violence were of his own family, and therefore the lybell should be sustained against all the Defenders, and all of them should pass to the knowledge of an Assise.

Duplys Mr. Alex^{r} Birnie, the Defence stands relevant notwithstanding of the Reply, ffor as to Auchinferdell's presence with his ffamily when the Deforcement was committed, it is not sufficient *per se* to inferr accession unless he had hounded out or commanded those of his ffamily to oppose the Messenger. And as the Caption is not direct to him, to put it in execution, he being no magistrate, so it does not command him to refrain or hinder any person. And as to the furnishing the horse to the Rebell, *non relevat*, unless it were lybelled that he was made prisoner before the horse was furnished by Auchinferdell, and that he did actually furnish him or command to furnish him, but the truth is, Auchinferdell did not at all furnish his horse to the Rebell, but Auchinferdell's servant being standing by with his horse, the rebel did take the horse by violence from him, the servant being but a boy.

Interloq^{r}. The Lords ffinds the lybell as it is qualified against Dugwid of Auchinferdell not relevant, but ffinds the same relevant as to the rest of the pannells, and therefore remitts the same to the knowledge of an inquest, and thereafter they continue the Diet till to morrow.

And on the morrow being the second of December, the

witnesses are examined and the Assise closed, and are ordained to return their Verdict the next day thereafter, which accordingly they did, whereby they ffind the haill pannells of the male kind (which are the words of the Verdict) free and guiltless of the crime of Deforcement lybelled or art and part therein, except ffrancis Dugwid of Auchinferdell, younger, whom they ffile as guilty of art and part of the crime of Deforcement, causing and commanding the women to fall upon him, but not in falling upon him himself as is lybelled. Verdict of the Assise.

The same day ffrancis Dugwid, younger, Tilliechoudie and severall others, of the pannells being absent when Sentence was to be pronounced, Auchinferdel their Cautioner, is amerciat, but there being a petition given in by the Cautioner on the eight day representing that they had mistaken the hour of the Diet, taking two a clock for twelve a clock, the Clerk is discharged to extract the Act of Unlaw.

On the said ffifth day ffrancis Dugwid, younger, being entered the pannel to receive his sentence, he is decerned and adjudged to forefault his moveables, the one half to the King and the other to the Bishop of Aberdeen as party grieved, and to remain in prison during the Lords their pleasure, but immediatly a petition was given in by him to the Lords, Craving his liberty upon this reason That the only ground whereupon the Assise had found him guilty, was that he had commanded some women to fall upon the Messenger and to put him out at doors, which they fand proven by the Witnesses Depositions, and the Witness having mistaken his expressions as is usuall in any man, and it being hard that Witnesses should be examined upon expressions, he humbly expected the Lords would the more readily consider him, seeing he had already remained in prison for some time, being apprehended for his absence from the Court on the third instant, when the Sentence was to be pronounced, by the mistake of the appointed hour. Sentence.

There are three Defenders declared fugitives at the first calling of the Proces upon the first instant, to witt Thomas Steuart in Coull, James Birse, in Tilliechoudie, and Elizabeth Rae, servitrix to Auchinferdel. Three Defenders fugitives.

The said Auchinferdel, younger, is decerned to pay the Witnesses Expenses.

Witnesses expences upon a petition given in by him upon the said eight day.

Petition the Lord M°Donald.

The other particulars continued in these severall Dietts are these, 1° The Lord M°Donald gives in a Petition to the Lords, making mention that some of his friends and relations having raised Criminall Letters in March last against Murish Mcpherson of Cloyne, and others of that name, for the Murder of Alexander M°Donald in Collachie, and the Petitioner being Cautioner for reporting, the Diet was Deserted for some informality in the Executions, and the Petitioner unlawed for not reporting, and there being new Letters raised, and already insisted on, Therefore craves that the Clerk may be discharged to extract, whereby the petitioner is unlawed, which Petition the Lords grants in respect the second Letters are duely reported.

Eod. first December, the Captains of the Town Companies of Edinbr. gave in a Petition to the Lords, Craving that in regard they are by vertue of their employment as captains taken up in keeping of the Guards, which diverts them from their private imployments, beyond their neighbours, and therefore the Lords would discharge their Macers to seek them to pass upon Assises.

The Lords declared they would take this Bill to consideration, and in the mean time they will excuse such of the petitioners as are upon duty for the time.

The said 4th December there is a Petition presented to the Lords by James and Alexander M°Intoshes, son to John M°Intosh of fforther, David Guthrie, John Burn and his servants, representing that they being declared fugitives at the instance of Helen Ogilvie, Relict of the deceast Robert ffarqrson of Burghderg and others for not compearing to underly the Law, for the alledged art and part of the Slaughter of her husband, tho they be able to make it appear that they were not truly cited. And now they being content to underly the law, and there being a Bill of Relaxation past for that effect, wherein they have offered the said John M°Intosh of fforther Cautioner for their appearance, the Clerk refuses to accept him because he was one of the pannells in the former

proces, and seeing the Lords by Interloq^r^ ffand that the qualities of hounding out condescended on against him were not relevant, so that he lies under no suspicion, and that the petitioners are not able to find another Cautioner but the said John who is ffather to some of them and masters to others, therefore craving that the Clerk may be ordained to accept him, and to appoint some day in June for the petitioners their appearance before the Lords, because they are not able to appear sooner, both by reason of the season of the year, nor can they cite to a shorter day all and sundry the pursuers whom they are expressly obliged to cite by the Letters of Relaxation, in respect these Pursuers lives in far distant places.

The Lords Commissioners of Justitiary ordains the forsaid Cautioner to be received and appoints the second Monday of June next for their appearance.

Eod. Die. The Lords upon a Petition given in by Alexander Graham of Drenie, prorogates the Diet in the Action pursued at the instance of him and the King's Advocate against M^c^Leod of Ashint for Treason, from the first to the last Monday of January next.

Edinbr. 15 Decem^r^ 1673 and 27th thereof.

The said day John Reid in Newmills is declared fugitive for the Slaughter of Mary Jamison, servitrix to Mr. Hugh Campbell of Newmills, by beating her with a pike staff and trampling on her belly, and thereby breaking the Rimb of her Womb, whereof she immediatly died, which ffact was committed the 19 September last, and John Jamison, her brother's son, pursuer of the action, not having compeared to insist, Hugh Archibald, Writer in Edinbr. his Cautioner, is unlawed.

The said 27 day, there is nothing but Continuations of the business against Robertson and Russel, prisoners, formerly continued.

Edinb. 5th January 1674.

Lord Advocate against Andrew Ross, prisoner, for forging of writts, continued.

Adam Mushett agt. Thomas Laurie, merchant in Edinbr., and Lodowick Callendar, in Leith, continued, but against Adam Walker, maltman in Kelso, deserted.

The pronouncing the Doom in the Action at the instance of the Laird of Coulter and the King's Advocate, continued.

Petition Sir Jo^n^ Whitefoord of Milntoun.

The said day also Sir John Whitefoord of Milntoun obtains a Warrand from the Lords upon his Petition to transport Robert fforrest, Margaret Scott, Janet Young, his late servants, from the Tolbooth of Lanerk, where they are presently incarcerate by the Sherriff at the Petitioner's instance, to the Tolbooth of Edinbr. there to remain while they undergo a Triall for the Crimes of Theft and others committed by them against the Petitioner, which desire is granted the Petitioner finding Caution to insist.

Edinbr. 12th January 1674, all the five Commissioners of Justitiary present and Newbyth Preses.

These Diets Sir Robert Preston of that ilk agt. Alexander Bothwell, portioner of Greenhill, for cutting and stealing of green wood, and the Lo: Advocate agt. Robertson and Russel, continued.

In the same Diet also is the Interloq^r^ and Depositions of the Witnesses in the Proces Margaret Haitley against John ffraser her husband, for Nottour Adultery, which I have sett down at the 17th Nov^r^ where the Debate is.

Eod. Die.

Fraser agt. Haitley, Adultery.

The said Margaret Haitley *alias* Jerard is indited and accused at the instance of the King's Advocate and the said John Fraser her husband, for nottour and manifest Adultery. The Proposition of the Dittay is founded on the 105 Act, 7 parl. Ja. 6, whereby it is statute That it shall be judged in law, manifest and nottour adultery, worthy of the pain of Death, where there is bairns one or more procreat, betwixt persons adulterers, or when they keep company and bed together notoriously known, and being called lawfully therefore before the Justice and his Deputes, they shall incurr the pain of Death. Upon which Act of Parl. its subsumed that

she is guilty of the said crime of manifest and nottour Adultery, in sua far as she being married to the said John ffraser in the year 1659, and having thereafter cohabite with and born diverse children to him, yet she shaking off all fear of God and Conscience of Duty, and the oath and promise of duty at her marriage with the said John ffraser, in the years 1661, 62, 63, 64, 65, 66, 67, 68, 69, 1670, 71, 72 and 1673 years, or in one or other of the saids years and months of the same, she committed Adultery with Angus M^cIntosh, brother to Alexander M^cIntosh of Conadge, and also with Walter Anderson, skipper or seaman in Borrowstounness, and sicklike with John Gordon of Avachie, and John Gordon his second lawfull son, and likewise with Mr. Thomas fforbes, lawfull son to Robert fforbes, Provost of Aberdeen, James Watson, younger, merchant there, Hector Abercrombie in Kirktoun of Rayne, John Meldrum, taylour there, and John Wilson, webster there, and sicklike with Leonard Clerk, foot soldier, and with diverse Tinkers, rands, sorners, dissolute and broken men, frequenting hills and caves, and with several other persons, and has had carnal dealing and copulation with the said Angus and with the saids persons @mentioned, or one or other of them, and has born severall bairns procreat betwixt her and the said Angus M^cIntosh, and the saids Tinkers, rands, sorners and other dissolute and loose persons in the said John ffraser's house within Edinbr. and in the house of Gavin Sangster, tailour there, and other houses within Edinbr. and Leith in the years forsaids or one or other of them or one or other of the months thereof. And to palliat her Adultery and to have greater freedom to keep company with the said Angus and the other persons @specified, she made use of the borrowed names of Margaret Gerard, Seton, and Barrat, and did travel up and down the several shires and burghs of this kingdom, and she having been imbarqued in a ship bound for Virginia in *Anno* 1667 as notorious whore and frequenter of Bawdy houses, she made her escape by the moine and means of these (as appears) with whom she committed the said crime of Adultery, and made the report and rumour pass that she died at Virginia, and has had ever since the year 1665 carnall dealing and copulation with the said

Angus M°Intosh and the other persons above written, or one or other of them, and did never appear to her husband, nor was known, seen, nor heard of by him since the said year 1665. And farder the Lybell condescends upon severall children brought furth by her since the said year 1665, to the said Angus M°Intosh and the other persons @mentioned. And the places where they were brought furth, and in particular that she brought furth a child to the said Angus, which she called Alexander, which deceased in the months of March or Aprile 1672, in the house of John M°Gillivray, brother in law to the said Angus, and was buried by him and Anna M°Intosh, his spouse, sister to the said Angus, as a child belonging to her brother, and that she brought furth another child in the parochin of Rayne and sherriffdom of Aberdeen, in the year 1671 or 1672, procreat betwixt her and some of the aforenamed persons, which was baptized by Mr. Robert Burnet, minister of that Paroch, and that she brought furth a third child in the year 1673, in the house of Margaret M°Curn, widow, in Dundie, and boarded the same in the house of Hugh Stewart, sclater, in Burntisland, where the child died after she had most cruelly broken the chaft blades thereof, and was buried upon her expences, and concludes that she is guilty of the crime lybelled, and ought to be punished accordingly.

Sir George Mckenzie as procurator for the Pannel, acknowledges the Dittay as it is lybelled and condescends on particulars to be relevant, whereupon the King's Advocate takes Instruments.

Interloqr. The Lords Commissioners of Justitiary ffinds the lybell relevant as it is restricted to the persons therein mentioned and remitts the same to the knowledge of an Assise.

The Assise being sworn, the Advocate for probation adduces several witnesses, and John Crab, first witness, proves the Adultery betwixt the pannell and Walter Anderson, skipper, and that he took them in the act in the Deponent's house where they lay two nights together, and that she dissembled her name and called herself Mrs. Gerard and said her husband was an Englishman and died at London. As also the same Witness and Patrick Seton, indweller in Aberdeen, do prove that about two years ago she did bear a child and said it was

to her husband Mr. Gerard, Englishman, and the said Patrick depones that it was born in the town of Rayne, and both of them depones that she nurished the child and that it died and was buried at Aberdeen. As also Issobel Morgan and Mary Lyon do prove that she brought furth a manchild at Dundee about a quarter a year ago, and that she was midwife to it and that the pannell said it belonged to her husband John ffraser.

The Lords ordains the Assise to close and to return their verdict to morrow, being the 13th day, which accordingly they did, whereby, by the plurality of voices they ffind her guilty of Adultery, but does not condescend with whom, for there being but four witnesses examined tho it be sufficiently proven by the first two that she bore one child, and by the next two that she bore another, which was sufficient to prove that she was an Adulteress, seeing she did not so much as pretend that these children were to her husband, or that she did cohabite with him. Yet it is not proven who were the persons who had carnall dealing with her except only the first witness, who depones agt. Walter Anderson, which seems to have stumbled some of the Assise, for four of them votes Not Guilty, as appears by marks sett down at their names.

In the same Diet the Verdict against her Husband is sett down, ffinding him Guilty of the Adultery pursued by her agt. him, which Verdict I mentioned before beside the Debate in his proces.

At the opening and reading of these Verdicts in presence of the pannells, the Lords continued the pronouncing of Doom till to morrow, and thereafter from time to time untill [1]

Edinbr. 19th, 20th, and 21st Janry. 1674. Present in the Court the Lords Collington, Strathurd, Castlehill, Preses, and Newbyth.

The said day intrans.

Robert Steuart, messenger, James Mckenzie sometime in Overtowie, now in Muirallhouse, indited and accused by vertue of Criminal Letters raised at the instance of Mr. Alexander

[1] Blank in MS.

Birnie agt. Mckenzie and Steuart, Oppression, and violent ejection.

Birnie, advocate, with concourse of his Majesties advocate as follows. That albeit by the Laws of this Kingdom, Convocation of the Leidges in Arms, be Crimes of Intrusion and violent ejection, and the extorting of meat and drink from the keepers of Change houses without payment, the troubling of Sherriff Courts after they are fenced and the crimes of hamsucken and wrongous Imprisonment, Robbery, Oppression and falshood, committed by Messengers in the execution of their offices, be crimes of a high nature, severely punishable and specially by the 2 St. K. R. 1. cap. 12, it is provided that if any person be convict of dispossessing any man, the Complainer shall recover his possession and his loss, and the party guilty shall be committed to prison, which is conform to the 3 book of the Majestie *de nova Dissaisina* and by the 83 Act 11 parl. Ja. 6 it is statute and ordained, That officers of Arms committing falshood and oppression on the Leidges in the execution of their office, shall be called therefore before the Justice and his Deputes or Justiciaries at particular dyets, and punish'd to the death, in case they be found culpable. Nevertheless the forenamed Defenders upon the 6 March 1673, came to the lands of Muiralehouse, in which the Pursuer is infeft and in possession be John Ross his Tenant, and being accompanied with many of the Leidges whom they had invocate, they took possession of the said house and ejected the Tenant and his ffamily and retains the possession and exacted meat and drink from the Tenants worth £20 Scots, without payment. As also the said James Mckenzie being cited to compear before the Sherriff of Aberdeen to underly the Law for the said crimes, he compeared, and after the Court was fenced, he drew or offered to draw a sword and pistoll, whereby the Court immediatly dissolved into confusion and disorder. And the said James having gone down the stair of the Tolbooth wanting his plaid, and having a sword and pistoll in his hand as said is, he raised a tumult in the Mercat place. As also the said Robert with a Convocation of the Leidges, did in the month of September 1671, and January 1672 go to the house of Sir Alexander Cumming of Culter, and broke up the door under silence of night, and wounded his servant woman, apprehended his person, took away his

money and riding horse, took Bond from him to present his person in Clunie,[1] and thereafter carried him prisoner to Aberdeen, without any just cause.

Mr. Alexander Anderson, for the pannel, alledges (Denying the lybell) that it is not relevant unless the pursuer will condescend on particular acts of violence, and albeit he should condescend yet Mr. Alex[r] Birnie pursuer, does not instruct an interest. This seems to be proponed against the first part of the lybell anent what is done to John Ross.

Replys Sir Andrew Birnie, Oppones the lybell bearing Convocation of the Leidges and Dispossessing Mr. Alexander's tenant, and its not necessar to lybell the circumstances of the violence, but these should be left to the Depositions of the Witnesses, and as to the Pursuer's interest he lybells that he is infeft and the tenant who was ejected has a Tack of him.

Duplys Anderson, a simple coming into a possession is not enough to inferr a Crime unless it were a violent coming. And as to the pursuer's Title by the Infeftment of the Tack, the pannel neither did nor could know, them and his possession was but clandestine by paction betwixt him and the Tenant, and any possession the pannel took was by Disposition and Renounciation from the Tenant, and has instruments upon the [2] and a Declaration under the Pannell's hand that he did no injury, and denies Convocation of the Leidges, and besides the Convocation is not relevantly lybelled in sua far as the number of the persons convocat are not condescended on, and any men that were there, were only to be witnesses to the execution of a Caption agt. John Ross the tenant, and as to the troubling of the Court and the other parts of the lybell, Birnie has no interest to pursue and the sherriff who has the only interest to pursue, has declared under his hand that the Court was not troubled.

Triplys Sir Andrew Birnie, That the voluntar Renounciation of Ross the tenant in favours of the pannel, cannot defend him against this pursuit, 1° Because he was Tenant by a Tack to the pursuer by payment of Maills and Duties, and he could not invert his Majesties possession. 2° The alledgeance ought

[1] The Advocates' Library MS. ends here.

[2] Blank in MS.

to be repelled as being contrary to the lybell, which bears that he intended by violence, and any Deed of Renounciation procured from the Tenant is since the committing of the crime.

Quadruplys Anderson, The Renounciation as it is sufficient to defend against the crime, even as a voluntar delivery, could defend against a Spulzie, and any infeftment the pursuer has, is but base and latent, and albeit the Tenant could not by a voluntar renounciation invert his Master's possession, yet by that Deed he takes off all pretence of Crime committed against himself by the alledged ejecting him violently. And whereas it is pretended that the Renounciation was purchased after the Tenant was ejected, it is simply denied, and if need beis its offered to be proven by the witnesses insert, and denies the Intromission with the Tenant's moveables before the Renounciation, except such as were disponed to the pannell, which also were left by the pannell upon the Tenant's ground and within his house, and all that was done before the tenant granted the said Disposition and Renounciation was this only that the Caption was execute and the goods locked up.

Quintuplys Sir Andrew Birnie, that the Defender Robert Steuart cannot pretend ignorance of the pursuer's right, because he was baillie to his Seasine and which is also now registrate, and was witnes to the Tack sett by him. Likeas the pursuer how soon he knew his Tenant was dispossest, he went to the pannell's house and required repossession by way of Instrument, and for the Disposition produced it is allenarly of Moveables and could be no Title to possess and labour the Pursuer's land and to eject his tenant, seeing the Pursuer stood infeft and be vertue thereof in possession.

Sextuplys Anderson, That he oppones the Renounciation being both of land and moveables and for a most onerous cause, and likewise oppones an Assignation of the moveables made by John Ross to John Walker with a translation thereof to the pannel.

Sir George Mckenzie adds for the pannel that as to the Convocation the Caption is a Warrand, and as to the ejection, denies it. And as to James Mckenzie the other pannel, the true matter of fact was, that he having married the heretor of Muiralehouse's mother, who is now in poll and to whom this

Defence for Mckenzie ad pannel.

pretended tenant was but a Tutor, and there being due to him £60 yearly for severall years, he was forced to transact with Walker in Aberdeen, who had a Caption, and having legally called together men with arms, which is necessar in that countrey, he went and apprehended the Tutor John Ross, and carried him prisoner to Aberdeen. And he not being able to transact for Walker's Debt, presently both the said James and he were advised and accordingly did transact for all, the effect of which transaction was that John Ross should for James Mckenzie's security, renounce any right he had to Muirallhouse, and presently enter James to the possession, which the said John Ross accordingly did. This being the state of the case, it is answered That the Caption was a Warrand *quoad* James to enter with arms and carry John Ross a prisoner to Aberdeen.

And as to the Ejection, 1° it is denyed. 2° The entry to the possession is offered to be proven to be voluntar, which is a sufficient Defence, and is no more contrary to the lybell than voluntar removeings or voluntar Deliverys are contrair to lybells of ejection or spulzie, or then voluntar Delivery would be against a lybell of robbery, and since *quilibet titulus excusat a spolio* much more it should do against a Crime for the same reason, and if in the coming of possession without open violence were accounted a crime tho without consent of the true Heretor, then all intrusions would be crimes, whereas it was never heard in Scotland that intrusion was a Crime, and it might be as well alledged that a person getting a base infeftment after his Author was denuded by a prior publict right did *eo ipso* committ a crime, or where there are more creditors or Comprisers who endeavour to gett themselves in possession by vertue of Tacks thoug the Tenants had taken Tacks formerly, would all be guilty of crimes, and the ejection may be a Crime when rendered odious by the qualities of violence and open force, yet of its own nature, it is but a civil pursuit tho *vis armata* is a crime *per legem Juliam*, and it can never be instanced that simple ejection is a crime by the Law of Scotland, and the Acts of *Reg. Maj.* founded on *de nova dissaisina* were only either when the same were absolutely violent and so criminal, and had no Title at all, or when

the Justices were Judges competent to all ejections, spulzies, perambulations, etc. as they were by the laws of the Majesty and much later even till the time of K. Jam. 5. And where its pretended that tho the Renounciation be prior to the entry, which shall be proven *scripto*, yet the entry here must be computed as the pursuer says, from the first execution of the Caption, which they say gave rise to the whole violence. Yet there is no weight in this alledgeance, ffor 1° his wife's contract of marriage, and John Ross the Tenant's obligation do clearly make out that she had right to this Annuity which is the cause of this Renounciation and *in favorabilibus* it must be drawn back *ad suam causam* especially to defend against a Crime but 2° the Caption was a legall execution, and therefore nothing done at that time could be accounted a part of a violent ejection and it is very ordinar for people when they are taken with Caption to transact for all their right. As to John Ross being tenant and so interverting the possession, it is answered 1° Interversion of possession by a Tenant is no crime as said is. 2° he was not obliged to know his possession, a Tack being a latent right and possession by a Tack can put none but the Tenant himself *in mala fide* by our Law. And tho the Messenger was Baillie to the Leasine, yet that is nothing to James Mackenzie. Nay, tho James Mckenzie had been Baillie, that knowledge would not have amounted to a crime, and its offered to be proven that the goods stayed in possession till after the Renounciation, and therefore there is no ejection prior to the Renounciation, seeing ejection is a casting out of good, and James Mckenzie had reason to take the keys tho he had done it, seeing he had right to the moveables.

As to the Riot at Aberdeen, the matter of fact is that James Mackenzie being summoned to find Caution, did ffind it and compeared, but proponing this defence, viz. That the Sherriff Depute could not meddle with this pursuit being criminal, the Sherriff Depute declared he would not meddle with it and refused to cause James Mackenzie renew his Caution, but the procurator ffiscal declared he would make him prisoner if he would not do it, which was a high contempt of Authority and being no judicial act, any man might have

opposed his taking by vertue of a Warrand from the procurator fiscall, so that tho James Mckenzie had violently resisted officers, yet it was no crime, for any man may resist unwarrantable orders, and it were no crime for James presently to resist if the Warrant were not from the Judge but from any Procurator, so that except it were lybelled that he had been ordered to ffind Caution, and in contempt of the Judge had resisted, the lybell is no ways relevant, and tho it were yet this matter of fact resolves in a sufficient Defence, and is offered to be proven, and the Declaration of the Judge is not produced as an absolvitor but to prove this matter of fact, nor is there any judiciall act produced for the pursuer, so that except it could be proven that he beat or wounded any person, the simple putting his hand to his sword when there was no Warrand to apprehend him, and when injury was offered him, could be no crime.

Sir Andrew Birnie replies, That the Pursuer is not bound, nor is there any obligement upon the Leidges to make intimations of Rights of Infeftments and Tacks to all the Highlanders and Robbers in Scotland for securing their possession, and for possession that is full, as in this case it was, there can be no legall ejection or dispossession, but either by Warrand of the King's Letters or consent of the partie to whom the possession appertains, which is not the Tenant, who has allenarly *nudam detentionem* and cannot prejudge his Master by any voluntar deed of his, specially considering that this pretended renounciation is posterior to the ejection lybelled, which is offered to be proven, and therefore the pannell's possession being *ab initio* vitious and violent, it cannot change the quality of it by any posterior Deed of the Tenants. And albeit there was no wounds or blood, the time of the ejection, which is accidental to ejections, which of their own nature and by the law require nothing but simple violence of casting out the tenant's goods or turning the inhabitants to the Door, and possessing themselves with the keys, ffor the Caption whatever pretence might be for convocating or for apprehending the person of the pannell, what colour or pretext can be in it for possessing the lands and continuing that violent possession to this day.

There is no Debate anent the last part of the lybell about taking the Laird of Culter, for it was extraneous and impertinent to lybell it, the pursuer being no ways concerned therein, and it is a part of Culter's plea against Mr. D. Gordon.

Interloqr. The Lords Commissioners of Justitiary refuses to sustain that member of the lybell as to the disturbing of the Sherriff Court in respect of the Sherriff Depute's Testificate, as likewise that member anent taking meat and drink in respect of the parties Discharge thereof produced. And as to that member thereof lybelled against Robert Steuart for the hamsucken and oppression lybelled, the Lords deserts the Diet, but the Lords ffinds the Ejection as it is lybelled relevant, and sustains the Convocation as a qualification of the same, but not as a distinct crime, and remitts the same to the knowledge of an Assise, and gives no Interloq^{r} upon that part of the lybell anent the taking of the Laird of Culter.

There are diverse witnesses this day adduced for probation, after examination whereof the Assise is enclosed and ordained to return their verdict to morrow, and then it is continued to the 21st day, at which time the Verdict is reported, finding nothing proven against any of the Pannells.

The said 19 day the Doom in the Action Culter against Mr. David Gordon is continued till the ffirst Monday of February, and the Lord Advocate against Ross for fforgery, to the samen day.

Eod. Die. Adam Mushett agt. Lodovic Callendar, in Leith, deserted. The Proces is usury. The pursuer is ffined for pursuing without the Councill's Warrand, because they had discharged such pursuits.

Eod. Die. There is a Petition presented to the Lords by James Innes, Writer in Edinbr. showing that the petitioner in March last had condescended to be Cautioner in Lawburrows for Robert Stewart, Messenger to James ffargrson of Keploch, in regard the said Robert being a stranger in the Town, could ffind no other Cautioner at that time, but now there is a Band presented subscribed by Thomas Garden of Canders, as Cautioner, who is a sufficient landed gentleman, therefore craves he may be accepted for the Petitioner.

The Lords refuses to alter the Cautioner and ordains

the petitioner to subscrive the Judiciall act in the books of adjournall.

Edinbr. 23 January 1674.

Janet Young, servitrix to Sir John Whitefoord of Milntoun, imprisoned at his instance, sett at liberty upon Caution.

Eod. Die. David Muire, son to John Muire of Park, gives in a Petition to the Lords, complaining on George Scott, chirurgeon, for robbing his cloakbag wherein was eleven Dollars and some black stuff and for causing the Petitioner to be put in prison summarly and detaining him there twenty days without any just cause, craving therefore that he may be liberate and his cloakbag and goods restored. The Lords grants the desire of the Bill upon his ffather's becoming Cautioner he shall behave civilly under the pain of death.

Edinb. 26 January 1674.

The Lord Advocate and Graham of Drennie against M^cLeod of Ashint, and the Lord Advo. agt. Robertson and Russell, prisoners, continued.

Eod. Die.

William Reid in Orden of Cromar and the King's Advocate, against Robert Taylour in Dun, *alias* Barron Taylour, for Theft and Oppression. The Letters makes mention, That where notwithstanding by the Laws and Acts of Parl. and constant practick of this Kingdom, the crimes of Theft and Robbery, Stouthreiff and Resett of Theft, are punishable by Death and Confiscation of the Committers Goods. And by the 26 Act of his Majesties first parl. it is statute and ordained that any person having goods or gear stollen from them, and having pursued the stealer thereof, shall have his own goods again wherever the same can be apprehended. And where the Stollen goods cannot be had the pursuer of the Theft shall have the just value of the goods and gear stollen from them out of the readiest of the Thief's goods with the Expenses waired out by the pursuer he always pursuing the Thief *usque ad sententiam*, and the crime of oppression of his Majesties leidges is severely punishable, nevertheless it is of

Reid agt. Barron Taylour: Theft and Oppression, not found relevant.

verity that the said William Reid in Orden of Cromarr, being a drover and having with him the number of ffourscore fifteen cows and oxen with him at the Muire of Gairntully beside the kirk thereof, within the sherriffdom of Dumfries, the said Robert upon the fifteenth day of October last bypast, or one or other of the days of the said month, came to the said William Reid at the Muire of Gairntully, under pretence and collour of buying the saids cows and oxen, and did invite him to an alehouse, promising him ready money for what price they could agree, and while the said William Reid was in the house of Andrew Craiknews, the said Robert Taylour and his servants did by way of Theft, Robbery, Stouthreiff and resett of Theft, steal and drive away the said number of ffourscore and fifteen head of cows and oxen at the price of twenty ffive pound Scots money, and did drive them in over the English border to Carlile where the said William Reid having followed his goods, the said Robert most falsely and wickedly did pretend that the said W^{m} Reid was Debitor to him in the sum of £200 sterling, ffor which sum he being a stranger in that place and not able to find Caution was imprisoned within the prison of Carlyle. And thus being detained prisoner for the space of eight days together, the said Robert Taylour did drive the ffourscore fifteen head of cows and oxen to the South of England, and made sale of them, where through the said Robert Taylour has committed Theft, Robbery, Stouthreiff and resett of theft, and is outhounder and ratihabiter and actor art and part thereof, and has committed oppression in procuring the said William Reid to be imprisoned as said is, which being ffound by an assise, he ought not only to be punished with death and confiscation of his moveables, at least with an arbitrary punishment, but also ordained to make restitution of the said ffourscore fifteen cows and oxen or the forsaid sum of 2375li as the availl and price thereof and of the expences in pursuing the said Robert Taylour as Thief, and also of the Dammage the said W^{m} has sustained through his Imprisonment, to the terror and example of others to committ the like hereafter, as in the said Criminal Letters and Dittay insert thereintill at more length is contained.

This Action being this day called, Sir Andrew Birnie as

Procurator for the pursuer, declared that he restricted the lybell to oppression and wrongous Imprisonment.

It was alledged by Mr. David Dunmuire, procurator for the pannell, that the Dittay as it is restricted is no ways relevant because it being acknowledged by the pursuer that there was a bargain with him and the pannell for 95 cows, and that the price lybelled should have been paid immediatly before delivery, the pannell, if he did meddle with those cows (which is denied) he had good interest so to do by vertue of his bargain, and the same was a sufficient title to assoilie him from this pursuit. 2° After the pannel had bargained, but not on the terms condescended on, it is offered to be proven that the pursuer's servants, by his order or connivance, did mix a drove of nine or ten score of cows belonging to the pursuer, promiscously with the pannell's drove, and did drive both droves so mixed together, by the space of 24 hours, untill they had past the Inglish Border, as also the pursuer being old and not able to travle with the Drove himself, he lent his horse to John Steuart, another Drover, and desired him to assist his servants in droving, whereby its evident that the pursuer did not look upon the pannell's intromission as Theft, seeing the two droves were mixt and driven together as said is, and continued to be so untill they were seized after crossing of the English border, by Sir George ffletcher and [1] Simpson, seasers of the Borders, as having come to England in the time of restraint, and after the 24th of August, at which time the yearly license of Importing expires.[2] And ffarder to evidence that there is not the least collour of Theft or oppression, the pursuer came to Carlyle and arrested the pannell for the price of the Cows, which was the confessing of a bargain, and repeats his exculpation founded on this Defence and two Testificates under the hand of the Town Clerk of Carlyle to prove it. And as to the wrongous imprisonment which is

[1] Blank in MS.

[2] By Act 15 Car. II. c. 7, § 3, it was provided that 'for every head of great cattle of the breed of Scotland that shall be imported or brought into England, Wales, or the town of Berwick after the four and twentieth day of August, and before the twentieth day of December in any year, there shall be paid to his Majesty the sum of twenty shillings; and the sum of ten shillings to him or them that shall inform or seize the same.'

lybelled either as relevant *per se* or as an aggravation of the Theft lybelled, granting it were true, yet the same being done in England *ratione loci* and by the law of that Kingdom, it is no crime, but only a ground for Dammage and Interest.

My Lo: Advocate Replys for the Pursuer and Declares that he restricts his lybell to oppression, being qualifyed as follows, viz. That the Pursuer having made a simple and positive bargain with the Defender for the Sale of the Cows lybelled in these terms that he should give present payment of the price of the same, at least within two or three days, and the pursuer, an old and infirm man, having followed the Defender into England the length of Carlyle, to the effect that he might be satisfied of the price of the same, the pursuer was so far from giving him satisfaction, that most violently in an oppressing way he boasted and threatned that he would brain him and refused altogether to pay the said price, upon pretence that the said cows were seized upon in England by the Seizers there, as being brought in after the day was past allowed for bringing in Cows to England, whereas the Pursuer having made a clear and simple bargain with the Defender, was not concerned whither the same was seased upon or not. And the Defender, persisting in his violence and oppression, and knowing that the Pursuer was a stranger, without any acquaintance in the place, much less without relation to any person that would engage for him, did most unwarrantably and under colour of Law, oppress the pursuer and did cause arrest him as being Debitor to him in a considerable sum of money, and not able to find Caution as said is, he caused imprison him, so that he did lye in prison for the space of eight days albeit he was not owing the Defender a groat. And whereas its furder alledged that unjust and wrongous Imprisonment by the law of England does not amount to a crime, but only does import and resolve in Dammage and Interest, its Answered that by the law of Scotland, wrongous Imprisonment at the instance of a Scotsman against another, is a Crime and Delict that is and ought to be severely censured, liberty being the great interest of the people, and in this case its more heinous and inexcusable then if it were committed in Scotland, the Defender having taken advantage as said is, of the pursuer's

being in another country, where by reason of his age he could not lye in prison without great hazard, and was not able to prevent it by finding Caution.

And whereas the Defender produces two Testificates under the hands of the Town Clerk of Carlyle and Thomas Jackson, attorney, the pursuer takes Instruments upon the Defender's producing and using the same, ffor thereby the Defender does acknowledge that he bought the cattle lybelled from the pursuer, and that he did commence a pursuit against him before the Town Court, for the breach of the Contract anent the Sale, whereby it is evident that the Defender having bought the Cattle, the seizure was upon his own hazard, and he did wrong both then and now to refuse the price.

2° No respect to the Testificates, in so far as they are made use of against the pursuer, because they are subscribed by him and cannot bind him. 3° Tho: Jackson's subscription cannot militate against the pursuer, the reason is wanting but it seems he has been the pannell's attorney.

4° Whereas the Testificates does assert that the pursuer and defender did discharge both their Actions then depending before the said Court of Carlyle, it cannot import no more but a Discharge of the Civil Actions, but does not preclude this criminal Action.

Duplys Sir George Mackenzie, That the bargain were confest upon Delivery of present money (which is denied) yet that is not relevant to inferr oppression, for not payment is but a civil failzing, and as to the driving in of the Cows, upon which all the rest depend, oppones their former Answer, bearing that it was done with the Pursuer's consent and by the help of his servants. As to the wrongous Imprisonment *locus delicti* must regulate the crime, and even here the raising a Caption might as well be called a Crime where the Debt is not due, which were most absurd. 2° *Paria crimina compensatione* and the pursuer did first arrest before the pannell caused imprison him.

Triplys Sir Andrew Birnie, the oppression is in this point, that there being a simple and clear bargain for present money to he payed within two or three days after the bargain, and the pursuer not to part with his goods to the Defender till the

actuall payment should be made. The Defender did not only drive away the goods into the Border of England, but when the Pursuer came to Carlyle to expect his money, he caused arrest him, and thereby disappointed him of his money.

The Lords Commissioners of Justitiary ffinds the lybell as it is restricted by my Lo: Advocate, not relevant to inferr the crime of oppression, whereupon the pannell's procurators took Instruments and protested for the relief of his Cautioners, which protestation the Lords admitts.

The said day John Couper, a poor workman, imprisoned by the Magistrates of Edinbr. for alledged Robbing the Earl of Tweddale's coach-house, having given in a petition to the Lords of Justitiary representing his innocency and poverty, and that he had lyen five weeks in prison and none insisted against him, is sett at liberty upon Caution to Answer when he should be called.

Eod. Die. Archibald Crauford of Auchmanes against Cunningham of Craigens and others, for oppression and demolishing a house, deserted.

Edinb^{r} 2 ffebruary 1674. Lords Collingtoun, preses, Castlehill, Newbyth, and Craigie present.

This Diet begins with the Continuation of five severall particulars often continued of before.

Lo: Advocate agt. M^{c}Leod of Assint, Treason, etc.

Eod. Die. Sir John Nisbet his Majesties Advocate and Alexander Graham of Drennie his Informer, against Neill M^{c}Leod of Assint[1] now prisoner in the Tolbooth of Edinbr. indited and accused That where by the Laws and Acts of parliament of this kingdom, and particularly by the 3^{d} Act of the ffirst parl. King Jam. 1 and Act 25 parl. 6 King James 2 it is statute and ordained That if any man committ or do treason against the king's person or his majesty and rises in fear of war against him or lays hands upon his person violently or

[1] The eleventh of Assynt. After the Restoration, he suffered imprisonment for his concern in the betrayal of Montrose, but seems to have been pardoned in 1666. Hence the charge of the betrayal is only set forth as an aggravation of alleged offences of later date.

resetts any that has committed Treason or that supplies them with help, need or counsel or that stuffs the house of them that are convict of Treason or holds them out against the king, or that stuffs houses of their own in furdering the King's Rebells, or that assailzies Castles or places where the king's person shall happen to be, without consent of the Three Estates of parliament, committs high Treason and shall be punished therefore as Traitors. As also by the 75 Act 9 Parl. Q. Mary, it is statute and ordained That no manner of person or persons whatsoever quality, estate, condition or degree they be of Leidges of this Realm, attempt to raise any Bands of men on horse or foot, with culterings, Pistols, Pikes, Spears, Jacks, Splints, steill bounds, white harnish or other munition bellicall whatsomever, for daily, weekly or monthly wages, without speciall License had in Writt and obtained of her Majesty and her successors, under the pain of Death, to be execute upon the raisers of the saids Bands, as also upon them that conveens and rises in Bands. And sicklike by the Common Law of all nations, and by the municipal laws and acts of parl. of this kingdom, and daily practick thereof, the imposing of Taxations and Impositions upon the subjects, is the prerogative of the King's Majesty and the three Estates of parl. and the usurpers thereof are punishable with forefaulture of life, lands, and confiscation of goods. As also it is statute and ordained That the takers of free persons, and putting violent hand on their persons and committing them to captivity and prison but warrand and Commission from the King's Majestie is a crime most detestable and abominable in it self as encroaching upon the Royall prerogative and authority most treasonable usurping in and upon them the Royall power. And sicklike by the 21 Act parl. 1 Jam. 6 of happy and blessed memory, intituled Act anent Theft and Resett of Theft and taking of prisoners by Thieves, it is statute and ordained That no Thieves, Robbers or broken men take any Scotsman at any time thereafter under the pain of Treason and lese Majesty, Nevertheless it is of verity that the said Neill M^cLeod of Assint having shaken off all fear of God, duty and alledgeance to his prince, did in the month of March 1649 treacherouslie, basely and inhumanely

The Subsumption.

1 The first particular is the taking of the Marq. of Montrose and delivering him to his enemies.

under trust, take and apprehend the person of the late Marquiss of Montrose, his Majesties High Commissioner and Lieutenant Generall when he was invested with his Commission under the King's Seall, and delivered him prisoner to the Rebells, his Majesties enemys then in arms against his Highness, by whom the Marquiss was murdered and put to death, ffor which the said Neill M^cLeod received 400 bolls of meal from Sir Robert ffarquhar of Munie, by order of the pretended states or committes then in power.

2 Second particular is that he opposed the E. of Seaforth in the service to the K. conducted the Englishes through his countrey and plundered it.

Likeas in the month of June, July 1654 the said N. M^c did convocate his countreymen and therewith opposed the Earl of Seaforth and hindered him to raise his countreymen and followers for his Majesties service, tho the said Seaforth was authorised and impowred for that effect by the Earl of Middleton, his Majesties Generall and did at the same time assist the English Rebells under the command of Generall Major Morgane[1] and conducted them through Seaforth's countreys and bounds lybelled, and drove away cows, horses and other goods out of the same to Assint, when Seaforth was absent and employed in the King's service.

3 Tertio, laying impositions upon ships at the Loch of Inver.

Thirdly, the said N. M. in the year 1669 and 70 did impose taxations upon the ships belonging to the Royall Company for ffishing and the other subjects, which did touch ground in the Loch of Inver and Assint, at the rate of three and six pislers per last, with two barrells of Herring, one for himself and another for his Baillie with a pair of shoes and 4 shill. sterline nightly during the time of their residence there, besides the exactions from the boats which served these ships, and doubled these impositions on strangers and forreigners.

4 The invading, taking and apprehending of Capt. Keir.

ffourthly, the said N. M. having convocate fourty persons in arms in the months of September or October 1669, he did therewith assault Captain Keir at Loch Inver and threatned him with present death, if he should not render himself to him, and having made him captive, carried him to the remote mountains of Assint, and there detained him prisoner *tanquam*

[1] Sir Thomas Morgan twice commanded the forces in Scotland under Cromwell, between the years 1651 and 1660. Amongst his military undertakings was the successful siege of Dunottar Castle. He also defeated Middleton at Loch Garry in 1654.

in privato carcere for the space of three days untill he redeemed his life and liberty with a sum of money.

5 The keeping garrison in his houseofArbrack and refusing to yield it to the King's sherriff.

ffifthly, in the month of January 1670 the said N. M. did garrison and stuff his house of Arbrack[1] with the number of twenty Neilsons *alias* Sleicheanabricks and others, his majesties declared Rebells, and ordered John Mc ean vic crokell *alias* M°Leod in Auchmore, and Angus M°Kay in Oldein, commanders and governours of the said garrison, and furnished and provided the said Garrison with swords, durks, and other weapons and ammunition lybelled. And the sherriff of Sutherland having in obedience to a charge given him in the King's name by vertue of Letters of ejection, raised at the instance of Sir George M°Kenzie of Tarbott, and John M°Kenzie, son to the E. of Seaforth, gone to his said house of Arbrack, to eject the said Neill his bairns and servants, the said Neill did most proudly, contemptously and treasonably fortifie and maintain the said house with his Majesty's Rebells @mentioned, and being upon the 27 December 1671 required by the said sherriff to render and deliver up the said Garrison, the said sherriff having shown the Letters of ejection bearing his Majesty's Signet, by which he was commanded to eject the said Neill his servants and ffamily, thir proud and treasonable expressions were returned, viz. That they cared not for the King nor would they regard any Seall but the Seal of the said N. their master, and that they would maintain the house for the Laird of Assint against the King and all that would take his part.

Likeas the forenamed persons to whom the care of the house was committed, did throw a great stone from the Battlement thereof upon design to have killed the sherriff, and did present above 20 guns to him when he attempted to discharge the Will of the Letters of Ejection, and for assistance of this Treasonable and rebellious Garrison, the said Neill did lye in sight thereof with two companies of armed men in military posture in Battle array.

6 The raising of men in arms to oppose a Commission from the Councill of ffire and sword.

Sixthly, the said Neil and his accomplices, being upon the 28 ffebry. 1671 declared fugitives by his Majestie's Commis-

[1] Or Ardvreck, the ruins of which stand upon the shore of Loch Assynt.

sioners of Justitiary, for these and other crimes, there was a Commission of ffire and sword thereafter by the Lords of privy Council to the E. of Seaforth, Lord Lovat, Laird of ffoulis and others against them, whereof the said N. being informed, he on the first, second, third or remanent days of May, June, or July 1672, did convocate 400 men in arms and placed over them Captains, Lieutenants, Ensigns, and other officers, and for severall days thereafter did muster and with displayed Collours, and did swear them to the samen and did reinforce the garrison of Arbrack with men, arms, powder, ball and other necessars for War, and the Earl of Seaforth having upon his great charges and expences in obedience to the Commission given to him, convocate and gathered together 800 men, did march to the said house with Canon and other Engines for battering the said house, the said Neill, notwithstanding he and his accomplices were desired to render the house in the King's name, and to dismiss his fforces, yet they would not obey, and those within the house returned this answer That they would maintain it to the last drop of their blood, and cared not a plack for the King. And after fourteen days siege when the Garrison was not able to maintain the house, they did deal with the said Earl of Seaforth for liberty to acquaint the said Neil who being in the mountains near the said house accompanied with 300 men in arms. And the said Neil understanding that they were not able any longer to defend the said house, yielded to and ordered the rendring of it, requiring a barrel of powder which the saids Rebells had not spent. And the said house of Arbrack being rendered, the said Earl and the other persons contained in the Commission did pursue the said Neill and did dissipate the party of 300 men which the said Neill had raised in arms in manner forsaid. And the said Neill being forced to flee to Caithness and Orkney, he was taken prisoner by Sir William Sinclair of May and sent to the Tolbooth of Edinburgh by the Council's order, where he now lyes, of the which crimes rexive forsaids the said Neill M^{c}Leod is guilty and has incurred the pains and punishments contained in the said acts of Parl., to witt the loss of Life, Lands and Goods.

The King's Advocate produces a warrand from the Privy

Council to pursue this Proces before the Lords of Justitiary as he shall receive Information from the Earl of Seaforth, and ordains Seaforth to pay six pence *p. diem* for his aliment in respect he is incarcerate at the Earl's instance, and that ay and while he be brought to a legall triall, and if need be is ordains Letters of Horning to be direct hereupon, which Warrand is here recorded.

His Majesties Advocate declares he does not insist upon the ffirst two crimes lybelled, but only as aggravations. The two does contain all which I have marked with the ffirst two figures in marginal notes.

Mr. John Eleis for the pannell propones his first Defence against the ffifth member of the lybell, viz., the fortifying of the house of Arbrack and Convocation of the Leidges for that effect, and says, That tho this part of the lybell were proven yet the pannell cannot be liable to the pains of Death and much less to the punishment of Treason as is lybelled, but can only be subject to an arbitrary punishment at most, in sua far as the said deeds done do not fall within the compass of the acts of parl. lybelled, ffor these acts doe only relate to the committers of treason, and stuffing their houses with Munition Bellicall against the king, which is not so much as subsumed against the pannel. And as to Q. M. Act anent convocating of the Leidges, it does appear both by the Rubrick and body of the Act, that the banding and raising men of war under pay, is only thereby prohibite, and can only be understood of leaving men to resist the king, intending the subversion of the State, but cannot be at all understood to militate against a forceable resistance of any private parties interest, and which as it is clear from the forsds Acts of parl. so it is most consonant to the Common Law and opinion of Doctors *ad leg. Juliam Majestatis*, where lese Majesty is described to be *quo armati homines cum telis lapidibusve in urbe sint, conveniantve adversus rempublicam*, upon which law the interpreters doe distinguish two kinds of sedition and convocation, the one tend *ad exitium principis et mutationem rei publicæ*, and this is treason and punishable accordingly, the other tends *ad exitium privatorum* and is made only punishable arbitrary, and the crime lybelled is but of the last kind, it being

nothing but a Convocation made by the pannell of his own tenants in order to the resisting of Letters of Ejection raised at the instance of my Lord Tarbott, whereupon no action of Blood followed. And therefore it cannot fall under the compass of the Acts of parl. lybelled so far as to conclude the pain of Treason or Capitall punishment.

Replys Advocatus, That he takes Instruments that there is no Defence proponed for the pannell against the other articles of the Dittay insisted on and not past from, and here he declares that he has past frae to witt the taking of Montrose and joining with Major Generall Morgane and craves that the other Articles against which there is no Defence proponed, may pass to the knowledge of an Assise. And to the Defence as it is proponed, oppones the Dittay which is most relevant and founded on diverse laws and Acts of Parl. And as the Advocate proceeds he resumes the Defences as resumed against both the last Articles of the Dittay, to witt the fortifying of the house of Arbrack and Convocating the Leidges to resist the Commission of ffire and sword, and says that both these last articles are relevant as founded on the laws and Acts of Parl. contained in the Dittay and on diverse other laws and on the Common Law. By all which its clear that the deeds and acts contained in the said two last articles amounts to Treason *lese Majestie* and *perduellium*, and particularly this appears by the 14 Act 6 Parl. Ja. 2, whereby its statute, that none rebell against the King's person or his authority, and there cannot be more clear or positive Rebellion against his Majesties authority, then the doing of the treasonable deeds contained in the saids articles, viz., the stuffing, garrisoning and holding out houses against persons invested, with his Majesty's Commission and Authority, and the saids articles amount to that height and notoriety of Rebellion, that besides the treasonable deeds forsaid, those in the Garrison did utter the contumelious expressions lybelled, to witt that they will maintain the house for the Laird of Assint to the last drop of their blood, and that they cared not a plack for the King. Likeas its clear that the saids articles and specially that anent the Garrison and house forsaid is directly and downright in the case and under the Compass of the 25 Act

6 par. Jam. 2, the pannells house being as is lybelled in the saids Articles, holden out and stuffed against the King's authority in furderance of Rebells in Rebellion. And as to the Act of Q. M. 9 par. cap. 75, there can be nothing more clear then that the case in question is *in terminis* under the compass of the said Act, in sua far as its lybelled that the pannell did convocate and raise in arms 400 men or thereabouts the time lybelled, and did place officers and commanders over them, and did other deeds contained in the saids Articles or one or other of them, and not only by the said Acts of Parl. the raising of bands of men of war without speciall license of the supreme Magistrate is forbidden and punishable. But by the Common Law it is Treason upon any pretence whatsoever to raise or keep together any number of men in arms or forces in a military way without Warrand from authority. It being the unquestionable prerogative of the Kings Majesty that there should be no rising in arms without his Warrand, much less against his Authority, as is the case lybelled. And by the 5 Act of the Session of Parl. *anno* 1661 it is declared that it is and shall be treason to the subjects or any numbers of them more or less upon any ground or pretence whatsomever to rise or continue in arms, or to maintain any fforts, strengths or Garrisons without his Majesties speciall authority had and interponed thereto.

Duplys Mr. John Eleis, That he oppones his Defence, and as to the Acts of Parl. founded on and first of them, viz. Act 14 par. 6 Jam. 2, whereby its prohibite that any person should rebell against the King's person or his Authority, the same does not constitute any definite or certain punishment against the transgressors thereof. And as to the 5 Act of Session of Parl. *anno* 1661, the same must receive interpretation from the current and tract of preceeding laws and from the Common Law, where it is only prohibite *Bellum gerere injussu principis*, so that the said Act which is intituled an Act asserting his Majesty's prerogative does exclude all others from raising War and entertaining soldiers to that end, but does not extend to convocations for resisting of private parties interest, otherways the same law might be extended to Deforcement where Messengers are resisted *cum vi armata* and people

gathered for that effect, which cannot be supposed to be the meaning of that act. And whereas the Lybell and Reply bears that slanderous and traiterous expressions were uttered against the King's person were uttered by these who were within the house, the same is no ways relevant against the pannell, seeing its not lybelled that he was within the house, or that he spoke these expressions, but on the contrary the lybell bears that he lay without the house with armed men, and yet bears that the expressions came from those within the house, so by the confession of the lybell he must be innocent of them *et delicta tenent suos authores*, specially where the crime is in words and the words cannot be fixed on the pannel as having given order to keep out the house, because if he gave any order it was only to keep out against the forsaid ejection, and if this order be exceeded in words or deeds, the pannell cannot be liable, and this Defence is proponed denying the lybell and under protestation to be heard upon the rest of the Articles, which are separate and founded on distinct laws, *quia in criminalibus contra reum non concluditur.*

A new alledgeance proponed for the pannel ag^{t} the 3rd and 4th Articles of the Dittay.

Thereafter its alledged by Mr. Robert Colt,[1] Advocate, as procurator for the pannell as to these other members of the Dittay insisted on. 1° The ffirst member anent the exacting of Duties for the ships, is not relevant as it is lybelled to inferr the crimes and pains of the Dittay, ffor albeit it be the King's prerogative to impose Taxes for publick use, which is the only thing prohibited by Law, yet that does not impede an heretor within his own bounds to exact from ffishers or merchants moderate dues for anchorage or the liberty of drawing netts upon their ground, which is the pannell's case. And there is no laws nor acts of parl. cited whereupon this part of the dittay is founded, and if either the pannell himself or his Baillie has exacted more then what is usuall in such cases, he can only be liable Civilly for restitution but not Criminally, at least not for Capitall punishment.

And as to the second member of the Dittay anent the taking and imprisoning Capt. Keir, if any such thing was done

[1] Son of the Rev. Robert Colt, minister at Inveresk; admitted 29th June 1667; afterwards Sir Robert; and Dean of Faculty from 1691 to 1694.

by the Pannell or his Baillie, they did it upon the account that they refused to pay his just dues upon accompt of ffishing in the Loch lybelled. All which the Pannell had power to do as a free Barron. And the Act of Parl. upon which this part of the Dittay is subsumed, to witt, Act 21 par. 1. Jam. 6, statutes only against Thieves, Robbers and broken men their taking of prisoners, and militates not against the power of Barrons or Heretors. 2° *Esto* that this were a Crime, yet by the Common Law *pœna privatum carcerem exercentis* is not *ultimum supplicium* or death, but *arbitrium Judicis* as says Clarus lib. 5. §§ *ffinali* quæst. 68 Num. 32 *ad finem*. 3° This part of the Dittay is altogether denyed, and if the taking and apprehending of Capt. Keir shall be proven, the pannell shall prove by the same witness that the pursuer shall adduce that he was *alibi* at the time.

It is added to this Defence by Mr. John Eleis that the exacting of more then the Merc[t] dues is not relevant to inferr any punishment unless it were lybelled that the same were exacted by force and that the Deeds of fforce and violence were lybelled otherways, its to be presumed that what was demanded more then the ordinary were given out of liberality and for causes known to the givers, and so can be no cause of the Dittay, and it was never heard that any person was condemned for a ryot, unless acts of violence had been condescended on and proven.

Replys Advocatus to these alledgeances made against the first and second members of the Dittay insisted on, which are the 3 and 4 members of the Dittay. 1° That to the ffirst of them viz. the imposing of Taxations, he oppones the Dittay being most relevand, ffor the imposing taxations by any subject without warrand or authority is an high Invasion and Incroachment upon regall authority, and is a treasonable crime, and the pannell does without all ground pretend that he exacted but all his ordinar dues only, which have been in use to be payed, and the pretence is most frivolous, seeing he does not alledge that he is infeft *cum portu* or that he has right by his Infeftment to exact dues. And tho he were infeft *cum portu* yet that could only carry the duty of Anchorage, which is but small and inconsiderable, whereas the Duties

lybelled are exorbitant, and being exacted both from natives and fforreigners, have tended to the disturbing of Trade. And it is known that the insolent and tyrannical methods used in the exaction of these dues from Capt. Keir, and the putting him in prison for the same, was the occasion of his leaving that part, and going to sea in a storm, in which he perished with the ship and Company. And to the next Member of this alledgeance bearing that the Act of Parl. of K. Ja. 6 is only to be understood in the case of Thieves and broken men their taking the prisoners and keeping in captivity, the narrative of the Act is opponed which is that it is not unknown that continuall theft reiff and oppression is committed within the bounds of the sherriffdoms therein mentioned, by thieves, traitors and other ungodly persons, and the thieves and broken men and inhabitants of the saids shires, takes diverse of his Majesty's subjects and detains them in prison till they be ransom'd, which being the narrative and the ground of the act and the evill intended to be removed thereby, it must regulate and interprete the statutory part of the same, and it cannot be denyed but the Defender does fall and come under the character and qualifications forsaids, he being nottorly an ungodly person and a Traitor, having taken and delivered as said is his Majesty's High Commissioner, and truly the taking of his Majesty's Leidges by way of oppression because they refuse to pay arbitrary exactions imposed upon them is upon the matter, and in effect a taking of the Leidges by way of theft and oppression. And the Defender cannot pretend that he did only uplift his ordinar dues, in respect its offered to be proven by a Warrand under his hand that he gave warrand to uplift double Custom, and he cannot pretend he was not a broken man the time he took Captain Keir, because before he took him he was declared fugitive, and his Majesty's Rebell *et exlex*. And the pretence @mentioned (here the Advocate returns to the first part of the Debate and makes a Triply) that the Convocation and keeping out of the house was upon the accompt of an ejection at the instance of an private party, is most unwarrantable and frivolous, in respect tho the said pretence were true yet no person could unwarrantably garrison or hold out any house or make any opposition to his Majesty's

authority, when the Sherriff or other officers came there upon what accompt soever they came to the pannell's house, but if he apprehended any wrong, he ought to have taken a legall way for reparation by application to ordinar Judicatorys without having provided hostile opposition, especially considering the two last Articles, or one or other of them was committed after he was denounced fugitive, and after Commission of ffire and sword were direct against him.

Quadruplys Eleis, That whither the Crime lybelled be found punishable capitally *vel* arbitrarie, yet the lybell as to that Article of garrisoning the house is no ways relevant unless it were lybelled and offered to be proven that the pannell being required in the king's name and authority to render the house, did violently resist and use acts of hostility against a person having the King's Commission, which cannot be subsumed in this case, but on the contrary it will not be denied but that the house when it was required was yielded upon the pannell's order, as also it is not lybelled that the same was garrisoned by his order or that he was in it or that it was held out by his order, or did resist, without which the lybell can no ways be relevant, it being free for all the Leidges, especially those who live in remote and broken places, to put provision and men in their houses, or keep themselves closs at home for resisting of private Incursions.

2° As to the Convocation alledged, made in the months of June, July or August 1672, the day is not condescended on, whereby the pannel is precluded of his Defence *alibi* and specially the day ought to have been condescended on in this Convocation, because it is lybelled to have been made after a commission of ffire and sword were directed. And sua it was necessar to condescend on the day that it might have been compared with the date of the Commission.

3° The Lybell should have born that the Commission was presented to the pannell and shown to him, and that notwithstanding thereof he remained in arms.

Nota. I observe that the advocates for the pannel are confused in their method in sua far as they begin at the ffifth Article of the Dispute and says only as to that, and then after the King's Advocate in his Reply is Taxative

for not answering the third and fourth Articles which are the first two that he insists on, they recurr and answers these, and after he has made a Reply to these Answers they recurr in the last part of the Dispute immediatly above sett down to Debate against the relevancy of the 6 Article, and so confounding and dividing their Defences of purpose and design that because the Defender has the last words something might be left unanswered, and this occasions the Interloq^{r} to be somewhat confused, the words whereof follows.

Interloq^{r}. The Lords Commissioners of Justitiary deserts the Diet as to the third Article anent Taxing of the subjects, and as to the fourth article anent the taking of Captain Keir, Finds the samen relevant as it is lybelled to inferr the pain contained in the Act of parl. And also ffinds the Defence of *Alibi* proponed against this article relevant, and remitts both to the knowledge of an Assise. As to the ffifth *quoad* the furnishing and keeping out the house against the Sherriff in June 1671, ffinds the samen not relevant to inferr the conclusion of the lybell as to the treasonable words specified in the 6th Article (the Interloq^{r} speaks but of the sixth, but both fifth and sixth bears the treasonable words, to witt, that they regarded not the king) deserts the Diet as to that. As to the ffirst member of the 6 Article (*nota* the Interloq^{r} calls it 7th but clears the point by resuming of the words as follows) viz. that after the publication of the Commission of ffire and sword the pannel did convocate and raise 400 men in arms, did frame them in Companies, swears them to Collours, and trained them, etc., in way and manner lybelled, as also the second member thereof anent the pannell's garrisoning and reinforcing the house of Arbrack in way and manner lybelled after publication of the said Commission of ffire and sword, the Lords Commissioners of Justitiary ffinds the samen relevant *per se et separatim* and remitts the same to the knowledge of an Assise.

Mr. John Eleis for the pannell takes Instruments upon the Interloq^{r}, and then the Diet is continued till to-morrow, and nothing more is in this Diet save some petitions of

witnesses for expences, and that Andrew Baine in Tilludge accused by the procurator fiscal of Aberdeen, is declared fugitive for Theft, and Alexander Irvine of Lenturk his cautioner unlawed. But on the morrow, which is the day to which Assint's business is continued, there is a new Continuation, and so from time to time till the 16 of this inst. where there is a new Debate upon the points of the forsaid Interloq^{r} which Debate with all that follows thereon in that or any other Diets I will sett down here together, the Debate follows.

His Majesty's Advocate on the 16th ffebry. inst. doeth alledge that the Interloq^{r} being only as to what is already debated, he ought and does humbly desire to be heard as to some points for clearing the same, and ffirst as to that part of the Dittay anent the imposing of unwarrantable taxes, tho these be unwarrantable usurpations of his Majesty's authority, yet they are only insisted on to inferr arbitrary punishment. 2^{o} as to that part of the Dittay anent the Deforcement, desires the Interloq^{r} may be cleared, and in order thereto declares that he insists only on that point, for to have the pannell in the King's will as a deforcer of the King's officers, conform to the 84 Act par. 11 Ja. 6 whereby it is statute that such deforcers may be civilly or criminally used, at the option of the party, and that their lifes and goods shall be in the king's will therefore conform to which Act, Craves that he may be capitally punished, in respect the deforcement in December 1671 is accompanied with such circumstances and aggravations as do amount very near to Treason. 3^{o} its desired as to the two last points of the Dittay, to witt the stuffing and garrisoning of the house and raising of men in arms after the Commission of ffire and sword was granted, that the Advocate's insisting on these points may be so understood as relates to the substance of the crimes lybelled viz. the stuffing and providing the house, and rising in arms in the terms and words contained in the Acts of parl. And specially the late Act *anno* 1661 no ways restricting himself to prove the circumstances and aggravations lybelled. And in speciall that he be not burdened to prove the number of men seeing the rising in the terms contained in the Acts of Parl. is not defined as to a certain number of men, but it is

sufficient for the pursuer to condescend upon a number, and he condescends upon 100, and upwards. And as to the circumstances of Drivelling, having Collours and beating drums and such like, the pursuer does not restrict himself to prove them but uses them as aggravations without which the Dittay may and ought to be sustained, specially seeing its positively offered to be proven that the rising in arms was after the Commission of ffire and sword was granted.

Replys Mr. John Eleis, In the first place by way of Representations that the Pannell having the severall days being impannelled in order to the answering of a lybell containing accomplication of severall crimes of a high nature and all resolving in an Article of Convocating the Leidges to the number of 400 in manner lybelled. And his Majesties Advocate and Informer ffinding they are not able to prove the samen (having conversed with the witnesses) does pretend to the ratification of the said Interloq^{r} upon the grounds represented by the Advocate. To which its answered that the former Debate and Interloq^{r} is opponed by which there is *Jus quæsitum* to the pannell and cannot now be altered, explained or declared, except in the case where any of the Assise shall doubt and desire to be resolved, which by Act of Parl. is to be done in face of Judgement, and as by the 79 Act Parl. 11. Ja. 6, it is statute and ordained by the King's speciall will and direction, that no precepts for continuing any Justice Courts, be admitted by the Justice or his Deputes in any time coming, which appears to be done in favours of the pannell, that he be not prejudged by delays. And seeing they cannot grant delays to prejudge him, much less can they ratifie or declare his Interloq^{rs} to his prejudice, but the Interloq^{r} being pronounced and Instruments taken thereupon is *conclusum* as to the Dispute and the cause must go to the Inquest, conform to the Interloq^{r}, who are Judges in probation and the Judges of the relevancy *nudam tantum habent rationem* as to the relevancy and *quam primum sententiam dicunt sunt functi officio.*

And whereas its pretended that the Interloq^{r} is not craved to be altered as to substantialls and that the number of men and other circumstances lybelled do not import, seeing the

Acts of Parl. and specially the Act *anno* 1661 defines all risings in arms to be Treason, without respect to the number of men, its answered as before that the said Acts cannot be extended as to any risings, but to such as in construction of law are treasonable *et tendunt ad exitium status reipublicæ*, otherways Convocations of men in arms at head courts, huntings, and suppressing of Thieves, should fall within the compass of the law, which was never the meaning of the Legislators, and the Lawyers themselves do distinguish as to the number of men, according to the circumstance of the place, in manner of living of the people where such convocations are made, and according to this distinction there should be a great allowance to the pannel because his County is subject to robberies, and its usuall there and in other places of the Highlands for the masters to keep great companies of men, and therefore the Convocations lybelled, cannot fall within the compass of the Acts of Parl. lybelled, unless it were specially lybelled, qualified and circumstantiate that the rising lybelled was done with the designs and intention to resist his Majesty's authority and government, which cannot be made appear, but on the contrary the lybell itself and the whole tract of the affair does demonstrate that the Convocation was to defend against Letters of Ejection at Sir George Mckenzie of Tarbott's instance and against a pretended Commission of fire and sword, which was the consequence thereof, and procured by the same person, or other private persons. And as lawyers in such horrid crimes as parricide and treason does require that *Machinatione dolus* and design should be expresly demonstrate and proven, and gives this reason that in parricide *actissima proximarum personarum necessitudo et reverentia erga parentes debita doli suspicionem aut minuit aut tollit*, so the crime of treason lybelled, being of an high nature, importing no less then the rebelling agt. the Sovereign, the thought whereof the Pannell does abhor, its humbly expected the saids Lords in Justice would not state the pannel amongst the number of notorious traiterous Rebells, unless it were pregnantly and positively lybelled and proven that he did convocate and raise such a number of men and did so train and discipline them, and did or threatned

such acts of violence with them as there may be no other construction left but that he did design to overturn and subvert or resist the King's Majesty or Government. But in sua far as the samen did tend to evite the violence of any private party tho under pretence of Law, it can be no more at most but *vis publica* and punished arbitrary, in respect whereof.

And as to the Deforcement its answered, adhering to the former Interloq^{r} and Debate, the lybell is no ways relevant because no execution of Deforcement is produced against the pannell, nor is it lybelled so much as that any Messenger was there or that he did proceed to eject, or that the Pannell did make resistance, all this is proponed denying the lybell and adhering to the former Interloq^{r} and Debate.

The Lords continues this Cause to the 18th instant, and then follows the Interloq^{r} in these words.

Interloqr. upon the New Debate declaring and explaining the former Interloqr.

The Lords Commissioners of Justitiary having read and considered the former Debate in the Action pursued by his Majesty's Advocate against Neil M^{c}Leod of Assint, they Find the sixth article anent the Deforcing of the sherriff, as it imports the pannel did deforce the sherriff, or that the sherriff was deforced by others at his command, relevant to inferr the punishment of Deforcement. As to that part of the last debate anent levying of taxes the Lords adheres to their former Interloq^{r} without prejudice to his Majesty's Advocate to raise new Letters upon that Dittay, in case it be found by the Civil Judge that the pannell had no right to impose and levy the said Taxes.

As to the ffirst member of the last Article of the lybell anent the raising of men in arms, the Lords for clearing the Assise ffinds it relevant that after the publication of the Commission ffor ffire and Sword, the pannell did raise or levy a 100 men or upwards in arms, and put them under officers or military discipline, or swore them to Collours, or had them under Collours or drivelled them or put them under daily, weekly, or monthly pay.

And as to the last member of the said Article the Lords ffinds the same as it is declared in the Debate, viz. That after publication of the saids Letters of ffire and sword, the pannel stuffed, provided and garrisoned the house of Arbrack, like-

ways relevant, and remitts the same to the knowledge of an assise.

After the Assise was sworn upon the same 18 day, the pursuer for his probation adduced the witnesses afternamed, viz. Donald M^cean vic conell vic Thynach *alias* M^cLeod in the knocken of Assint, Angus Miller in Auchmore, Donald Bayne in Dingwall, John ffraser there. List of the names of the witnesses.

Mr. John Eleis objects that M^cean, etc., *alias* M^cLeod, first witnes, cannot be received, ffirst because by the Act of Regulations and that part thereof which relates to the Criminall Court, the last article of that part, its appointed that the List of the Witnesses to be made use of for proving of lybells and exculpations be delivered to the party at exculpations, to the effect that parties may know what to object against them, but *ita est* the said witness was not in the List, at least not under the same name, he is in the lybell but was listed under the name of Donald M^cean vic kean vic conell, which as it is not the name in the lybell, so it is not the name he is known by, but it is the name and designation of several other persons by which they are known and distinguished, according to the custom of the countrey. 2^o^ Tho his name were clear, yet he cannot be received as a witnes to prove the convocations and rising in arms lybelled, because its offered to be proven that if any crime was committed by the pannell, in that point the said Donald was *socius et particeps criminis* in sua far as its offered to be proven that he was one of the persons of the Convocation in arms, and so its presumed in law *aut omnino crimine clusurum aut in participes derivaturum*, and which objection the Judges did sustain in the case of Robertson and Robertson upon the day of 16 tho the crime was nothing else but the demolishing of a cott house. And if it has been so sustained in a small crime *qui irrogat infamiam* much more it should be in the case of capital punishment, and was so sustained in the case of Captain Barclay day of 16 where a witnes was expresly repelled upon this ground that he was in company with the actors where a man was killed *in rixa decussus vita ibi agebatur*. And moreover the said witness is most suspect because he is now tenant to the Earl of Seaforth who drives Objection agt. the first witness with the answers and reply thereanent where the principal question is if *socius criminis* can be a witness *ad condemnandum in crimine majestatis*. Decided affirmative.

on this proces and informs therein by himself, and the pursuer Drenie and others imployed by him.

Mr. Robert Colt adds, that its the common opinion of Lawyers that *Socij Criminis* tho two of them should depone against a party as guilty, yet their testimonies are not sufficient for conviction, and in particular this is the opinion of Clarus lib. 5 ff *finali* num. 9, *si duo (inquit) testes deponant contra notorium quod eos corriperit non est sufficiens ad probationem*, and again in his 21 quæst. *ibid.*, he says *quod nominatio facta contra reum per socium criminis alia non concurrente presumptione non est sufficiens nedum ad torturam*, and the pannell being lybelled to be convocator, and the witness being one of those who rose, it is evident that they are *socij criminis* by the 75 Act, 9 par. Q. Mary, which statutes equally against risers of arms and those who convocate them.

Answers Advocatus, that to the ffirst objection, founded on the Regulation, he oppones the execution and the list of witnesses, containing the name and surname of the witness insisted against. And to the second objection, that the said witness is *socius criminis*, takes Instruments upon proponing thereof, because thereby the pannell's society and accession to the crime is acknowledged *nam relata se probant mutuo ponunt et tollunt*, for a witness cannot be *socius* to the pannell in a crime unless the pannell be guilty himself.

2° This objection of *socius criminis* is only competent in these cases, ffirst when any person that is pretended to be *Socius* is adduced as a witness for the person accused, in which case the reason that he is *clusurus criminis* and will declare both in favours of the pannell and himself, does only militate. Secondly it takes place when a person being suspect and hath confest that he hath committed a crime, does likewise declare against other persons as particeps, in which case, if by his own Confession he made himself guilty and infamous, its to be presumed he will adhere to his Declaration against the others, it being the ordinar *solatium inferorum habere pares*, and therefore in that case the opinion of Lawyers cited by Mr. Colt does militate and *non redditur sine tortura*. Or Thirdly, when a person is convict of a crime by a criminal sentence importing infamy, in that case such a person being *socius criminis* cannot be a witnes because he

wants fame and integrity, which is the foundation of all credit, and in speciall of that to be given to witnesses. And seeing it cannot be subsumed that the witnesses objected against is in any of these three cases, he being rather adduced for the Defender, nor being so much as *Inquisitus* much less *damnatus*, and having emitted no Declaration or Confession against the pannell in Judgement the objection is of no weight and ought to be repelled. *Secundo*, as to the pretended practick alledged in the case of Captain Barclay, it is a mistake seeing the witness that was objected against in that case, was not alledged to be *socius* with the Captain, but in effect to have been a party against him and *testis domesticus* to the pursuer, it being alledged that witness came out of the pursuer's house of purpose to invade and sett upon the Capt. and did concurr with these against whom the Captain was forced to defend himself as he alledged, and was in kin with the person whom he killed for his own defence as he pretended. *Tertio* its not proven that the witness in question had any accession as *socius criminis*. *Quarto* Tho the said witness were *inhabilis* as he is not for the reasons @deduced, yet in this case he ought to be received for proving a Dittay of Treason pursued at the instance of the King's Advocate by order of the Privy Council for the publick interest, ffor *in criminibus exceptis* and specially *in Crimine lesæ majestatis socij criminis* may be admitted as witness l. Nullus C. ad. L. Jul. Maj. *in eo enim crimine omnibus equa conditio est et L. famosa ffeod.* which is also clear by the opinion and authority of all the Doctors and namely ffarin. lib. 2. quæst. 56, num. 148. Mascard. Conclusione 464 num. 14. Menochius and others who say that *participes criminis admittuntur testes cum veritas aliter haberi nequit et quando constat ex natura actus quod testes alij non adsunt*, and specially the crime of treason, Mascard. *dicto lib. conclusione* 467, num. 6 et 7, Alex^r^ Consilio 64, num. 5. lib. 10, *et Doctores passim*, and the same is clear by an Act of Sederunt *anno* 1591. It is statute that *socij criminis* may be admitted witnesses in cases of lese majesty.

Replys Eleis that *socii criminis* may be indeed admitted *in crimine lesæ majestatis* and all other crimes that are occult such as the crime of sodemy, coyning of false money, heresie

and such like *qui facile sine socijs committi non possunt*, but they are only admitted in order to torture but never to make faith in Judgement, and by a ground of condemnation because here the presumption of Law that *socius criminis* will either tergiverse or deny the whole crime or lay the blame upon the pannell, is alse strong and urgent as in other crimes, and this is consonant to the opinion of Clarus, Mathæus and others cited by them, and if in any case upon extraordinary occasion such witnesses has been received in treason, it was only in the case where Treasons consisted in Machinations, Designs, and Counsell, where the nature of the crime required such witness as absolutely necessar, but upon no pretence can the forsaid witness be admitted by Law in this case where the crime lybelled is not Treason *jure communi*, there being no acts of hostility intended *contra rem publicam*, but only falls under the compass of law agt. *vis publica* and is found by Interloq^{r} to fall under the statute *anno* 1661 anent convocating of subjects, and so is only treason *jure statutorio* and cannot more be pertended to be lese majesty then Theft in a landed man and murder under trust.

Interloq^{r}. anent the 1st witness. The Lords Commissioners of Justitiary Repells the Objection and Reply in respect of the Answer and sustains the witness to prove the rising in arms and garrisoning the house and treasonable convocations.

Objection agt. the 2^{d}. Mr. John Eleis alledged that Angus Miller in Auchmore could not be received as a witness against the pannell, because he was declared fugitive and commission of ffire and sword given out against him for some of these very crimes which are lybelled against the pannell.

Answers Advocatus that notwithstanding of the Objection he ought to be received for proving the crimes of treason lybelled.

Interloq^{r}. The Lords sustains the said Angus Miller to prove the rising in arms, garrisoning the house, and treasonable convocation lybelled.

I have considered the Depositions of the four witnesses adduced, who are only examined on the points of this last Interloquitor, and all the four proves that Assint the pannell raised 300 men in arms before the Earl of Sea-

forth went up to his countrey, and the ffirst two of them proves that these men were modelled in a formall company and their officers named by the pannell and that they had a staff instead of Collours to which they promised to adhere, and that they were drivelled and that 18 men was put in the house of Arbrack to garrison it and that it was furnished with victualls and ammunition, and that the Earl of Seaforth did march against the house with the King's forces and cannon and made an Engine of Timber by which he approached to the foot of the wall after he had layen eight days about it and then it was surrendred. The Lords ordained the Assise to inclose and to return their verdict to morrow.

My Lo: advo. speech desiring that the Assise may be inclosed of new again.

On the morrow being the 19th ffebry. 1674, all the Lords Commissioners being present, the Advocate desired in behalf of the King that before the verdict be opened the Chancellour of the Assise may declare whether or not the Inquest has taken nottice of the Commission of ffire and sword and executions thereof as a probation, and if they have not taken nottice of the same it is craved that yet they may take nottice thereof, and in order thereto may be again inclosed, and if they have taken nottice of it, but not as a probation and evidence upon pretence that the witnesses in the execution were not there to affirm the same, its humbly desired to whom it is incumbent to consider and determine the relevancy of the lybell and probation, that they may yet clear the Assise as to the relevancy, seeing its without all question that the said Execution is an undoubted evidence, being of it self an Execution of a Messenger, who by the law is authorized to make such an Execution, and containing no nullity in the samen. 2° The said Execution being produced and used as a probation, was not objected against, as there was no ground for any objection and was acknowledged by the pannell's procurators to be a lawfull Execution and in effect was made use of by the pannell in so far as his procurators founded an objection against one of the witnesses upon the same. 3° The said mistake (if any be) is so evidently groundless and absurd, the crimes lybelled being committed a long time after the Execution of the Commission of fire and sword, that both in this

case and in order to the consequence and preparative as to the future there is a necessity that it should be cleared, seeing if all the witnesses contained in the Execution were dead and so could not compear, it were most absurd to think or assert that the Execution should be void unless it were *improven*. 4° its not unusuall for the Assise after they are inclosed should desire to be cleared in any point of law as to the relevancy of the probation, seeing its nottourly known in the case of the Lord Balmerinoch,[1] the Assise tho consisting of persons of the greatest nobility of Scotland, after they were inclosed, did come out again and in face of Judgement that point of the relevancy in the probation was debated, viz. whither the Assise was to consider simply the deed in question or that circumstance *quo animo* it was done, and therefore seeing the Assise might of their own motive desire to be cleared of a mistake in point of relevancy, it may be desired by his Majesty's Advocate that the said mistake might be cleared by the Judges both in order to his Majesty's interest that a person who is evidently guilty upon the probation adduced may not be acquitt to the great shame of justice and encouragement of wickedness, and that the Inquest may not be insnared, and for acquitting a person nottarly guilty, may not be processed themselves for willful error and perjury. And its humbly represented by the Advocate, that its a proper time to clear the said mistake in order to the effect forsaid before the opening of the verdict, seeing *res est integra*, and the Advocate humbly desires that the Lords may give their Answer in write, that it may be known the Advocate has done his duty.

Verdict of the Assise.

The Assise all in one voice (only one excepted) assoilzies the pannell Neill M^cLeod of Assint from the crimes contained in the two members of the last Article, viz. that the pannell after the publication of the Commission of ffire and sword did levy and raise a 100 men and upwards in arms, and put them under officers and military discipline or swore them to Collours, or had them under Collours or drivelled them, or put them under monthly or weekly pay, as also that after the publica-

[1] This refers to the case of John, second Lord Balmerinoch, tried in 1633-5 for his connection with the presentation of a 'Supplication' to the Crown against grievances.—W.

tion of the said Commission of ffire and sword, the pannell stuffed, provided and garrisoned the house of Arbrack, in respect the publication of ffire and sword is not proven. As also assoilies the pannell from taking of Capt. Keir, cont[d] in the 1[st] article, in regard not proven. As also assoilies the pannell from the Deforcement mentioned in the sixth article, because not proven.[1]

Edinbr. 5th and 6th ffebry. 1674. All the ffive Commissioners present in the Court.

Keith agt. E. of Errol's soldiers for slaughter.

The said day William fferguson, George Morison, John Crookshank, George Guthrie, William Kennedy, John Pearie, William Gordon, militia soldiers in the Earl of Erroll's Regiment, indited and accused at the instance of the King's Advocate and the relict and children of Andrew Keith, servant and grieve to Dame Elizabeth Crichton, Lady ffraser his Informers for the slaughter of the said Andrew when he was about his Lady's affairs attending the Lady her ground upon the lands of Cairnbulze and attending the servants there on the 6 June 1673, by giving him an wound in the neck with a sword and diverse strokes in the head with the butts of their musketts, and another wound in the belly, through which his bowells gush'd out, and after he had removed from them a litle distance, by giving him two wounds in the back with a durk, one of which came through his belly, after which they did beat his wife and daughter, and did wound his daughter with their swords to the effusion of her blood, because they asked mercy to the Defunct, who was a man of sixty years of age.

Sir George Mackenzie for the pannells alledges, that they cannot upon this lybell go to the knowledge of an Assise as guilty of the crime of murder, because (always denying the killing of the said Andrew Keith) it is alledged they might lawfully have killed him in sua far as they were in the necessar execution of a lawfull command, they being soldiers in Erroll's regiment, and having been commanded by Lieutenant T——

[1] This case, in respect of the points raised, the debate, and interlocutors, was regarded as an important one, as were also the cases therein quoted (Robertson, 9th March 1671, and William Barclay, 12th Nov. 1668), and are referred to by Hume in treating of 'Pleadings and Relevancy' and 'Proof by Witnesses.'—W.

their Lieutenant to go and poynd the lands of Cairnbulge belonging to the Lady ffraser whom the defunct served, for the absence of her soldiers from the Militia, in the execution of which command they mett with a most illegall opposition from the said Defunct Andrew Keith and others, who invaded William Gordon, one of the soldiers, and wounded him in the fforehead with a sword, and who also invaded the whole pannells with iron grapes, drawn durks and other weapons. And the pannells being in duty obliged to prosecute the poynding and in hazard of a Court Marshall if they had desisted from opposition, because of their command, what they did was most lawfull and cannot be accompted murder, since the Law of Arms and Custom of Nations, the necessity of war and military discipline allows killing and such as resist soldiers in the like commands. 2° This at most is but an excess of that duty which is incumbent upon soldiers in such cases, and wanting all forethought fellony and design of murder, and being imputable to another lawfull case, it is at least only punishable *quoad excessum*, and consequently cannot inferr the pain of Death.

Replys Sir George Lockhart for the pursuers, That he repeats and oppones the Dittay, and the murder lybelled was a horrid and cruell murder, committed with all the other circumstances and aggravations condesended on, and specially that after the Defunct was wounded and faintly making away with his bowells in his arms, he was most cruelly and unnaturally pursued and followed by the pannells and wounded. And after he was lying upon the ground he received severall strokes. And as to the pretence the pannells were soldiers and had warrand from the officers to go and poynd and were *in actu officij* and might have killed, its answered the pretence is most unwarrantable and irrelevant, ffor 1° altho the pannells were soldiers and were able to produce any sufficient warrand to poynd, and had been deforced in doing the same, yet its *mandatum* and downright contrary to Law to assert that thereupon they might have proceeded to the committing of the murder lybelled, and which not being *delictum militare* but *delictum commune* is not permitted to soldiers nor any other tho they had been specially war-

ranted and authorized to poynd, but law in case of such resistances and deforcement has introduced and established proper remedies, but has never armed private persons to proceed to such extremity as to kill and committ murder, albeit any resistances could be made appear or proven. 2° Its no ways relevant to pretend that they being soldiers had a warrand from their officers to poynd, even so much as to sustain the lawfullness of the poynding, in respect the Act of parl. justly foreseeing the irregularitys and inconveniences that would inevitably have ensued if either soldiers or officers had or could have pretended that they had power to poynd his majesty's subject. The parl. has thought so far fitt to secure the just interest and fortune of the people as expresly to provide all such poindings upon the accompt of Deficient should be warranted by a warrand under the hands of the commissioners of Militia, whereof two should not be officers, and no such warrand was or can be produced. And if the parl. thought fitt so far to secure the interest and priviledge of the people, it were a strange supposition to think that debauched and drunken militia soldiers should in their fury and madness invade and committ murders upon his majesty's peaceable subjects. And the truth is the pannells were so transported with rage and fury that they killed the ffather, wounded the daughter of thirteenth or ffourteen years of age, wounded the mother and working horses and committed the other aggravations lybelled. And whereas its alledged that it was only an excess and that there was no precogitate malice, its answered that pretence is groundless and the murder lybelled was absolute and *de sua natura illicitum*. And it is not the case of excess that the law considers, which is only where parties were *ab initio* unjustly invaded and were in the case of self defence, but did a litle exceed *in eo moderamine* that law requires in the priviledge of self defence, but what does that concern the case in question, where the murder lybelled is condescended upon to have been committed by invading, beating and killing the Defunct and wounding the other persons lybelled, And that there was not precogitate malice is of as litle weight in regard the law of this kingdom considers nothing except it were the case of casuall homicide *et dolus et*

precogitata malitia is ever presumed, and needs not be otherways proven but *hoc ipso* that the murder was voluntar, law and reason understands it as *homicidium dolo commissum etiam in rixa commissum* is punishable with the pain of death *et pœna ordinaria*, even tho the occasion had been altogether sudden and accidentall, and that there had been no procogitate malice before hand, which our law regards not, seeing *homicidium voluntarium*, and yet the murder lybelled is not so much as in the case of *homicidium in rixa commissum*, it being lybelled that the pannells came to the place and unjustly invaded the Defunct and wounded and killed him, and committed these great transports of excess of rage and fury as does evince and make appear that they had insatiable thirsting after the Defunct's blood, and which was not otherways satisfyed but by killing the Defunct and wounding the other persons lybelled.

Duplys Sir George M^c^Kenzie That as the Law considers a malitious design *et dolum* in all crimes, so it is peculiar to the crime of murder to require this in a more eminent degree called by our Law fforethought fellony, and tho where an unlawfull deed follows such as killing, that is always presumed, yet the presumption is fully taken off in this case by ascriving this killing to another and to a lawfull cause, ffor as it is very well known that thir poor people nor none of them had not the least quarrell, nay nor acquaintence with the person killed, so they could have nothing to irritate them against him. And upon the other hand they being soldiers lawfully listed, they were warranted and by that warrand forced to poynd, and this warrand, as it impowred them to poynd, so it impowred and authorised them to do everything, without which this poynding could not become effectuall. And it were against not only the Law of Arms but the interest of the Commonwealth for whose defence the Militia is so carefull and chargeable raised to forbid much less to punish those who are obeying the orders necessar for its preservation. And if a Captain should desire to bring him any person prisoner, or to drive goods for him, or to bring him any thing else, the soldier is not obliged, nor dare he dispute the lawfullness of the command. And whereas its pretended that

there may be other remedies then to kill, its duplied that private soldiers can use no remedy, but blindly and implicitely obey, nor are they obliged nor dare return and say they were opposed, for that would not exoner them, for they are *ratione officij* bound to putt the command in execution, except they be impeded *vi majore*, which can only defend them. And if it were otherways, soldiers should still find pretexts never to obey, and these against whom they are impowred might by opposition render the command ineffectuall, and soldiers are necessarily forced and impowred *ratione officij* even to proceed to Killing, for if the persons who resist should absolutely refuse to obey, being commanded in his Majesty's name, they in so far oppose his Majesty's necessar authority, and there is no possibility of putting a command in execution except it were known soldiers had this power, for they could stand in aw of nothing else. And tho the life of a man be very precious, yet it is far less valued and considered then the generall interest of the Commonwealth and the preservation or order therein, to which order all men owe their lives *et sibi imputent* to the opposers, who are authors of their own ruin, and can only blame themselves, so that this is no inconveniency to the Common wealth, neither has the Law any regard of it, when its ballanced against the publick interest, which as it holds in all cases, so much more in this, where not only opposition was made, but wherein the Defunct and the rest were the first aggressors, and wherein the aggression and opposition was deliberate and resolved upon as a contempt of authority, in sua far as its offered to be proven that when they heard the soldiers were coming, and when they were come, the defunct Keith and one ffalconer the chamberlain and the rest, without giving any reason why they would not give up their poynds or pay their ffines, did swear they would lye in the green first, and immediatly did draw and invade, and by the invasion did wound the pannells and put them in hazard of their lives. And where its pretended that the order was not valid because not subscribed by two members of the militia beside the Lieutenant, its answered, 1° That for what they know the warrand was lawfull, and its offered to be proven that it was torn violently from them, and they being

illiterate and ignorant persons they knew not who subscribed it, but if it be proven it was taken from them, it must be produced, and therefore unless it appear upon the production that it is unwarrantable, this paper as all other papers, must be presumed to have been solemn. Likeas its offered to be proven that by vertue of the same warrand they received obedience from Inneralachie and severall others the same day. 2° The Defunct nor none else contraverted this informality of the warrand, which if they had done, they had returned and got a better warrand, so that they cannot ascrive their disobedience to this informality, nor were their ignorant soldiers *in mala fide* thereupon. 3° The soldiers are not obliged nor dare they debate informalities with their officers, and the officers who gave the warrand are only liable upon this accompt, nor does the want of an informality in a warrand authorize the people to disobey for else they would be judges of their own cause and judges of when and how far they should obey, but they should have gone along to the officer and have shown him why they were not liable to be poynded or to be poynded by his sole warrand or had their redress to the Commissioners of Militia, who are judges in that case, but summarly to disobey, swear, wound and invade was most unwarrantable, and if such courses were allowed the militia, wherein people can hardly be persuaded to serve, will absolutely dissolve ffor they must be killed by officers, people or judges in case of obedience or disobedience.

And whereas its pretended that they killed the man after he was fallen and could not resist, its answered, that they being *in actu licito* and the opposition being unlawfull as said is, the wounding when the person could not resist cannot be considered, for after a fray or tumult is once unlawfully begun but much more when its offered to be proven that even the time of this wound the pannells were sett upon by many who putt them in hazard of their lives, so that they could not consider in that heat and *furor militaris*, just how much violence was necessar, but the beginning of everything is to be considered, especially agt. those who *versabantur in rea illicita* and in favours of those who were in execution of a lawfull command. And whereas its pretended that this is

contrair to the lybell, its answered that all criminall lybells are still so lybelled as that the murderer is said upon malice and design to have first invaded and killed, so that if this were sufficient to cutt off exculpations, there could never an exculpation be made use of, for the lybell is and still might be made to preclude it, but such is the favour granted by the Law to pannells in defence of their lives, that it considers more in ciminalls the safety of the people than the nicities of form, and Judges doe there admitt the lybell and Defence to probation, that so the exact and full truth may be known, and that the force of the Depositions on both sides may be equally ballanced, by the proponing of which Defence it is designed that the Defence should result upon Self Defence in the way and manner @represented, viz. that the pannells were first invaded with durks, swords, grapes, etc. and other invasive weapons.

Interloq^r.

The Lords ffinds the killing and slaying of the Defunct, Andrew Keith, and art and part thereof relevant, and remitts the pannells to the knowledge of an Assise, with this Declaration, That after the probation is led, the Lo: will consider (if need beis) how far the concourse of any of the pannells does amount to art and part of the said slaughter. Also the Lords ffinds the first member of the first Defence proponed for the pannells ffounded upon the order for the poynding, not relevant, and ffinds the Defence of Self Defence relevant and remitts the same to the knowledge of an Assise.

Verdict of the Assise.

The Advocate for probation adduces severall witnesses, and upon the 6 ffebry. the verdict of the Assise is returned by the mouth of Thomas Wilson their Chancellour, whereby they all with one consent ffind it proven by the Depositions of these witnesses that fferguson, Gordon, Morison, Crookshanks, and Pearie were all of them guilty of the slaughter of the Defunct Andrew Keith, and that fferguson was more guilty then the rest, and assoilzied Guthrie and Kennedy, because the lybell was not proven against them.

Sentence.

The Justices decerned Willian fferguson to be beheaded on the 18th instant at the Grassmarket of Edinb^r and continued the pronouncing of Doom against the rest till the 16 inst.

Edinb. 19th ffebry. 1674.

This Diet begins with the last part of Assint's proces which wee have joyned with the rest of the proces before making it there to be in this Diet, to witt a speech of the Advocate to the Assise and their verdict cleansing the pannell.

Eod. Die.

Advo: agt. Agnes Johnstone for the murder of a child.

Advocatus against Agnes Johnstone, prisoner in the Tolbooth of Edinbr. indited and accused for the murdering of Lamb, daughter to John Lamb in Airth, and Helen Williamson his wife, and being grand neice to the pannell and an infant of three quarters old, by cutting the child's throat with a knife when no person was present in the house, which crime is judicially confest by the pannell, and in her Confession she declares she had no provocation from any person. She confesses she was sometimes possest with a spirit which did draw her neck together and that sometimes the parents pretended she was feigned and threatned to putt her away, and that in resentment of this, which was no provocation, she cutted the child's throat, and that before she committed the said murder the Spirit had tempted her severall times to putt down her self and that she once attempted it and threw her self into a well in Clackmannan, and that there was but litle water in it, and she cried out to one Hall, a servant of Clackmannan's, and he helped her out. Confesses she did not tell any body she was thus tempted nor had power to tell, and declared it was about ffastenseven last that she began to be troubled with the said Spirit. That she is about 50 years of age and never married. Cannot write. *Sic subr.* Tho. Wallace *I. P. D.* Ro. Martine, clerk.

By this confession you see how dangerous it is to give way to a temptation, for where it takes not place in the effect designed, it usually ends in another.

The Pannell is found guilty and hanged at the Grass mercat of Edinbr. on Wednesday 25 inst.

Petition Urquhart against Donaldson for new Letters.

This day also the Lords Commissioners of Justitiary grants warrand *in presentia* for raising new Letters at the instance of the king's Advocate and Thomas Urquhart of Armhall, his Informer, against James Donaldson in Elgin, for stouthreiff

and false weights and measures, upon a petition given in by the said James to them, bearing that it was not his fault that the former Diet was deserted, but that the fault lay with the witnesses who compeared not, and whereupon the Lords did Discharge the granting of New Letters without Warrand *in presentia*, but they answer not the second part of the Bill which craves a warrand to the Sheriff to apprehend and transport the witnesses.

Edinb^{r} 23^{d} ffebry. 1674.

This Diet begins with a number of Continuations, some whereof are in the end of the last Diet, which I did not take nottice of, not being materiall.

Petition Cornwall agt. Lauriston.

Eod. Die. The Lords grants Warrand to transport William Lauriston from the Tolbooth of the Canongate to the Tolbooth of Edinbr. upon a petition given in by Alexander Cornwall in Borrostownness, shewing that he was incarcerate upon his desire, upon the ravishing of Margaret Cornwall, his daughter, and stealing some houshold plenishing, and that he intended to accuse him, and the petitioner ordained to ffind caution to pursue and aliment him while he be putt to a Triall.

Edinbr. 2 March 1674. The Lord Justice Generall, to witt E. of Athol, Lords Colington, Strathurd, Castlehill, and Newbyth present.

Warrand anent a list of the burgesses of Ed^{r}. to be assisers.

The Lords Commissioners of Justitiary (it should have said first Justice Generall) gives warrand to the Clerk to return the Assize book made by the Magistrates of Edinbr. and recommends to the said Magistrates to give a new and exact book of the most honest and understanding burgesses and other neighbours of this said burgh.

Advo. agt. M^{r}. James Mitchell, murder, treason, assasination, mutilation, etc.

Eod Die. Mr. James Mitchell,[1] prisoner in the Tolbooth of

[1] Our author calls this a remarkable case, and certainly the indictment is a most remarkable document, and well worth perusal. He touches lightly upon the desertion of the diet and the sentence which followed upon fresh proceedings. These proceedings took place four years later. Mitchell had confessed his crime

Edinbr indited as follows. You are indited and accused that forasmuch as by the common law and laws and Acts of parl. of this kingdom, rebellion against his Majesty, his sacred person and his authority, and the rising in arms in Rebellion and joyning and keeping company with those who are in Rebellion and all accessory to the samen, are deeds and crimes of high treason and lese majesty and punishable with the pains of Treason, forefaulture of life, lands and goods. And by the Common Law and Law of Nations and the law of this kingdom, murder and the assaulting and attempting upon any person or persons by way of fforethought felony *et per insidias et industriam* of purpose and design to kill, are most atrocious and detestable crimes and destructive to and against the being of humane society and that security and confidence which is the foundation of all society, and is severely punishable, but especially when the samen are committed upon the persons of Counsellours and other Officers who do represent Authority and are liable to the mistakes and malice of wicked persons for doing their duty, or when the samen are committed upon the persons of Churchmen, Bishops or Ministers who are of the same ffunction, who by the laws of all nations are priviledged and secured as much as can be from the malice and sacrilegious attempts of wicked persons, and particularly it is statute by the 16 par. Act 4. Jam. 6, That whatsoever persons invades or pursues any of the Lords of Session, Secret Council, or any of his Majestie's officers for doing of his Majesties service, shall be punished with death. And by the 7 Act par. 1 of his Majesty's Royall ffather *in anno* 1633, intituled,

to one of the Privy Council upon the assurance of his life. The Council, in respect that the prisoner had refused to adhere to his confession when before the Justiciary, declared themselves free from their promise, but as there was no evidence except the confession, the diet was ultimately deserted and Mitchell sent to the Bass. Sharp's supposed concern in bringing about the subsequent proceedings greatly increased his unpopularity. Law, in his *Memorials*, says that Mitchell was 'put in the boots at the instigation of the said Bishop Sharp of St. Andrews.' Mitchell's own account of his examination under torture is deeply interesting. See Wodrow, vol. ii. p. 454. The dishonourable conduct of the Privy Council in this matter of Mitchell would, even if it stood alone, be sufficient to condemn that infamous body. That the promise of his life was given to Mitchell is beyond all question; yet four councillors, including Sharp, subsequently denied it upon oath.

Anent invading of Ministers, its statute that the same shall be extended to all Archbishops, Bishops and Ministers whatsoever. And by the 4 Act of his Majesty's 2d parl and second session of the same, its statute that whatsomever persons shall be guilty of the assaulting the lives of Ministers, that they shall be punished with the pain of Death and confiscation of their moveables. And by the laws and acts of parl. of this kingdom, the mutilation and dismembring of any of his Majesty's subjects by way of fforethought fellony, is an high and capitall crime and punishable with the pain of Death. Nevertheless ye having shaken off all fear of God and Conscience and sense of Duty, Loyalty and alledgeance to your Sovereign Lord and King and of humanity it self, you have presumed to committ the crimes forsaids in sua far as a great number of seditious and disloyall persons living in the west in the year 1666, risen and appeared in arms in a most desperate and avowed Rebellion against his Majesty, his Government and Laws, and having joyned and modelled themselves in an Army under Collonell Wallace and others and having had the boldness to march through the Countrey in a military and hostile manner towards and near Edinbr. the chief city of the Kingdom, and to encounter and fight his Majesty's forces untill the saids Rebells were subdued and suppressed. You was involved and joyned with them in the said Rebellion in the forsaid year 1666, and in one or other of the months of the said year and upon the severall days of the same, or one or other thereof, having had nottice from the said Collonel James Wallace and Captain Arnot and diverse others, you went out of Edinbr. about eight a Clock at night and immediatly rode towards Aire and stayed and went alongst with them in arms untill the saids Rebells came near Pentland, and the night before their defeat at Pentland, ye came to Edinbr. at the desire of Capt. Arnot (an officer and person eminent in the said Rebellion and thereafter forefault and execute for his accession thereto) to speak as you did pretend with one Mr. James Stirling and Mr. Robert fferguson and others who were then in Edinbr. and notted and known to be persons disaffected to his Majesty and his Government, and that anent and in order to an address to be given in to

the Council in behalf of these in the Rebellion, but truly of purpose to propagate and promote the same by your seditious practises and endeavours with these of the same principals, and that you might deprave and induce others to joyn with you therein. And his Majesty by his proclamation upon the first nottice given to his privy Council of the said Rebellion, declared all these who appeared in the said Rebellion to be Traitors. And having discharged all his subjects to assist, resett, supply or correspond with them under the pain of Treason. And thereafter in the said year 1666 after the said Defeat at Pentland his Majesty by another proclamation emitted by advice of his privy Council, having discharged and inhibited all his subjects that none of them offer or presume to harbour, resett, supply or correspond with, hide or conceal the persons whose names are therein exprest, and especially McLellan of Barscot
Canon of Mondrogit,[1] Mr. John Welsh, and you yourself, as appears by a proclamation of date the fourth of December 1666. And likewise his Majesty by proclamation dated the ffirst of October 1667, having of his Royall Clemency and tenderness and of his speciall grace and favour, granted his full and free pardon and indemnity to those who were engaged in the said Rebellion, excepting always from the said pardon the persons therein mentioned, and in speciall the said
Canon of Mondrogit, Collonell Wallace, Robert Chalmers, brother to Gadgirth, Canon of Mondrogit, younger, Mr. John Welsh and you your self, Nevertheless, you tho a declared Traitour and a person excepted from his Majesty's pardon by proclamation forsaid, and whom his Majestie's subjects were thereby discharged and inhibite to harbour, resett, supply or correspond with under the pain of Treason, you had the boldness to presume to repair and come to Edinbr. and after the saids proclamations in the saids years 1666 and 1667 and subsequent years you did stay within the said city of Edinbr. diverse months, at least days, and did converse with persons not only of your own principals and who had been in the Rebellion, but with others of his Majesties

[1] It was this man who afterwards turned informer and used to assist the soldiers in their search for fugitives.

subjects, involving them by the contagion of your company and conversation, and bringing them under the compass of the Certifications contained in the saids proclamations as favourers of the said Rebellion and accession thereto, and guilty of the same, tho you had a long time of breathing and repenting of your Rebellion and treasonable and wicked practises forsaid, and was not brought to condign punishment for the same by a strict and exact search and inquiry, which might have been used against you, a notorious and declared Traitor, and excepted as said is from all pardon, yet ye was so far from making that use which you might and ought to have made of the said forbearance, that by the contrair you persisted in your wickedness and proceeded to another step of impiety and barbarous cruelty and inhumanity, and conceiving a deadly hatred and malice against a Reverend ffather in God, James, Archbishop of St. Andrews, a person who had never known nor seen you as to take nottice of you, much less had given you any offence, without any ground or quarrell, and upon account only that he was advanced and promoted by his Majesty to be Archbishop and to be of his Privy Council, and did serve God and his Majesty faithfully in the saids stations and offices, you did daily contrive, resolve and design the Murder and Assasination of the said Archbishop, and in order thereto, having provided yourself with a pair of long scots iron pistols near musket bore, you did upon the day of [1] 1668, proceed and take the opportunity to execute and go about your horrid and cruel design, when the said Archbishop in the afternoon of the said day did come down his own staire and was going to his coach, being to go abroad about his occasions with the Reverend ffather in God Andrew Bishop of Orkney, and you having a charged pistol with powder and ball, did most cruelly and felloniously assault the saids Bishops, and did fire and discharge and shott the saids pistolls upon them, being within the said coach, and God of his goodness having preserved the Archbishop, whom you intended to murder, you did by the said shott, grievously

[1] The day and month are also blank in the indictment as printed by Wodrow, which may have been taken from this Manuscript, but according to this historian the attempt upon the life of the archbishop took place upon 11th July 1668.

wound the said Bishop of Orkney, to the great hazard and danger of his life. So that having for a long time, with great torture, pain, and expense of blood, languished of the said wound being in a most dangerous place in the joyning of his hand and arm, where there is a confluence of nerves and fibres, he is not recovered nor will never recover his health to that measure and vigour that he had and might have if he had not gotten the said wound. And he is mutilate and dismembred as to his arm and hand, so that he can make no use of the same, and after you had attempted and committed the said assasination and villany *tanquam insidiator et per industriam* and by way of fforethought fellony, you did go away and escape through the multitude and throng that had gathered upon the noise of the said shott, having another charged and bended pistol in your hands of purpose and design to have killed any person who should have offered to take and apprehend you. The forsaid attempt and villany being without any parallel, all the circumstances of the same being considered, viz. that it was committed by one who professed to be of the Reformed Religion, and who did pretend to be and serve as Chaplain in severall familys. That it was committed upon persons of the sacred function and ffathers of the Church, and that it was committed to the great scandall and disadvantage of the Christian Religion and especially of the protestant Reformed Religion, the professors and preachers of the same having so much declared against and by their preaching and writing having exprest their detestation of such attempts and practices committed by persons and owned by writers of the Roman profession, and that it cannot be instanced that any of the protestant religion was guilty of any attempt upon the account of Religion, and that the worst of men being ashamed to committ the like villanies for covering the same, and for their security doth take the opportunity of darkness and solitude, in corners and solitary places. Your malice was so implacable that you was prodigall of your own life to be master of the life of the said Archbishop, and in the High Street of Edinb. and in the day light, and in the face of the sun, and before many persons, near or at a litle distance from the said coach, whether you could not but expect presently to

be seased upon, you did devolve yourself and did adventure to committ the said most villanous and wicked attempt. Yet notwithstanding of all the saids aggravations and circumstances of horror which might and should have possest your conscience with horror and remorse, you did continue in your implacable malice, and did converse and keep correspondence with the said Robert Cannon of Mondrogit and with Welsh of Cornlie and M^c^Clellan of Barscob, declared and excepted Rebells and Traitors, had diverse meetings with them and upon discourse concerning that attempt, every one of the saids persons putting it upon one another, when it was putt to you, you said and uttered these or the like speeches, shame fall the miss, and that you should make the fire hotter. And after the time and attempt forsaid, in the year 1668 and subsequent years, months and days of the said rexive years, and in one or other of them, your guilty conscience disquieting and pursuing you, you did rove and go abroad severall times to Holland, England and Ireland, untill Divine justice did drive and bring you back to this kingdom, that Justice might be satisfied and vindicated in some measure where you had committed such villanies. After your return you did proceed to that height of boldness and confidence or rather impudence that you did repair to and live in Edinbr. and was married there with your wife, who is yet living, by Mr. John Welsh,[1] who is not only a declared and excepted Traitor by the Declarations @mentioned, but is forefaulted for his accession to the said Rebellion. And your boldness was so great in outdaring both God and authority, that for a long time you have been lodged and has keeped a shop near that place where the Archbishop doth and is in use to lodge when he is in Edinbr. Untill at length you was discovered and apprehended, having upon you when you was taken, the same pistol which you shott when you committed the said attempt, which was found under your coat, charged with powder and three ball, of purpose to attempt again and execute your bloody design against the said Archbishop, at least against any person who should offer to take you. From all which premises

[1] Welsh is described by Sir George Mackenzie as 'a person of much courage but no parts.'—W.

its evident that you are guilty of the saids nottorious crimes of Treason, Murder and Assasination by way of fforethought fellony, and is a percussor and *sicarius* and of mutilation, and of the other crimes @mentioned. And that not only as to single Acts of Treason and Rebellion, but of a complication and continuall tract and course of habituall rebellion and treason, and you are art and part of the same, and of one or other of the saids crimes, and therefore the saids pains ought to be inflicted upon you as a traitor and murderer, and as guilty of the crimes forsaids in an exemplary manner to the terror of others.

His Majesty's Advocate produced a Warrand from his Majesty's privy Council for pursuing the said Mr. James Mitchell and desired the same might be read and recorded in the books of adjournall, whereof the tenor follows.

Edinbr. 12th Febry. 1674. Forasmuchas Mr. James Mitchell is now imprisoned in the Tolbooth of Edinbr. as guilty of being in the late Rebellion *in anno* 1666, and of attempting the assasination agt. the Archbishop of St. Andrews by shooting a pistol wherewith the Bishop of Orkney was wounded, therefore the Lord Commissioner his Grace and the Lords of his Majesty's privy Council do remitt the said Mr. James Mitchell to the Commissioners of his Majesty's Justitiary to be proceeded against for the saids crimes, according to Law, and grants order and warrand to his Majesty's advocate to raise an Inditement against him for the saids crimes before the saids Commissioners, and to process and pursue him theeupon.

This lybell and warrand being read the Diet is continued till Monday the 9th instant, and thereafter its continued till the 25th inst. at which time the Diet is deserted, and thereafter he is accused[1] and sentenced to be hanged upon a new different lybell and a long debate on the 7th, 9th and 10th of January 1678. But tho nothing followed on this Diet, yet I thought fitt to sett down the lybell word by word, because it was a remarkable case.

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[1] Our author is perhaps right in ignoring the trial.

Eod. die. The Lord Advocate agt. Robertson, Russell and Ross, also the Doom against ffraser and Haitley, and the rest of the E. of Erroll's soldiers who received not sentence formerly, all continued.

Eod. die. James and Alexander McIntoshes, sons to John McIntosh of fforther, Donald Garters, John Birnie, David Guthrie, and Thomas ffleeming, their servants, declared fugitives for the slaughter of Robert ffarquharson of Burghderg. This is the second time they are declared fugitives, ffor if they were first declared, they suspended and relaxed and ffand caution to compear *vide* . . . . day of . . . . and John the ffather is excused by reason of his sickness, and the Diet as to Angus McIntosh, another of the sons compearing, is deserted because the pursuer is not ready to insist and the relict and nearest of kin of the pursuers are unlawed for not insisting, but afterwards this Act against the pursuers is discharged to be extracted upon the 9th March next, *vide* a petition given in by them in the end of this page.

McIntoshes and others declared fugitives for the slaughter of Burghderg,

Eod. die. Lo. Advocate against Robert McIntosh for Incest, continued to the Circuit Court at Dumfries.

Eod. die. Sir Robert Preston, portioner of Greenhill, against Alexander Bothwell, for stealing of Green Wood, deserted.

Adam Mushett, ffactor for the Donator of the usury against Thomas Laurie, merchant in Edinbr. for Usury, deserted in respect that the deed of usury lybelled being by the acceptation of a Ticket and compearance is made for the pannell by Mr. David ffalconer, who for him produces a Decreet of Declarator and Reduction purchased by the Pannell before the Lords of Session, wherein the Ticket is reduced and declared null upon the head of circumvention.

Nothing more in this Diet but continuations of Diets formerly continued.

Edinbr. 9 March 1674.

Advocatus and Robert King and James Freeland and Alexander Dunbar, writers in Edinbr. and Major Alexander Hamil-

King agt. Freeland and Dunbar for forgerie, deserted, and Major Hamilton another defender declared fugitive.

ton of fforehouse, indited of fforgery upon the 22d Act, 23 par. Jam. 6 for forging of a Bond of Cautionry in a suspension raised at the instance of the said Major Hamilton agt. James Steuart of Torrence, and Crauford of Carsburn as assigneys by the Lord Semple, which Bond of Cautionry is dated the 12th of November 1673, to which Band they did counterfeit the name of the said Robert King as Cautioner and the names of Humphray Barber and John Marshall, witnesses to the said subscription, and at the least they used the same false bond, which action being called, and Robert King and James Steuart, two of the pursuers, not being present, and Thomas Craufurd, the other pursuer, not being ready to insist, and Major Hamilton, one of the pannells, being absent and the other two pannells present and willing to underly the law, the Lords Commissioners of Justitiary declared Major Hamilton fugitive, deserted the Diet as to the other two pannells, and unlawed the two absent pursuers for not insisting.

Petition James and Alex^{r} M^{c}Intoshes and others granted, and afterwards upon the 10th June wee have the pet^{rs} tried and cleansed.

The whilk day also there is a petition presented to the Lords of Justitiary by Alexander and James M^{c}Intoshes and the other persons who are declared fugitives with them in the said Diet making mention that they were not able to compear tho innocent without an exculpation, and that the pursuers to preclude them of this benefit had cited them upon 15 script days precisely, and that they having meaned themselves to the Lords of Justitiary, they were resolved to continue the Diet untill the second Monday of June, the petitioners always finding sufficient caution for their appearance at that Diet, and they having sent home for a Band of Cautionry and the same not coming timeously, they were declared fugitives, and the pursuers did apply to the Council for a Commission of ffire and sword, which was stopped upon a bill given in by the pannells bearing that they had past a bill of Relaxation and had offered sufficient Caution for their appearance, but that the pursuers of purpose to stop the Relaxation had contraverted the sufficiency of the Cautioner, and the Lords of Council in answer to the said Bill did recommend to the Lords Commissioners of Justitiary to consider the sufficiency, and the Lords Commissioners for triall thereof, granted Warrand to the petitioners to cite witnesses. Therefore and in respect of all the

forsaid Dilligence and the just hinderance the Petitioners had from compearing, craves the Lords Commissioners would discharge their Clerk to extract the Act whereby their Cautioner's unlawed and they declared fugitives and would advise the Depositions of the witnesses now adduced. The Lo. Justice Generall and Commissioners of Justitiary discharges the booking of the forsaid Act and assigned the 25 instant, that in the mean time triall may be taken anent the sufficiency of the Cautioner offered, and discharges the pursuer from seeking after a Commission for ffire and sword till the said day.

Petition Dalmahoy agt. Mason.

Eod. die. There is a petition presented by Margaret Dalmahoy, relict of James Ralston, glasier in the Canogate, and her children, desiring William Mason, prisoner in the Canongate Tolbooth, for the killing of her husband, may be transported to the Tolbooth of Edinbr. by reason the Canongate Tolbooth is not a sufficient prison, and that the Magistrates of Edinbr. and the keeper of the Tolbooth may be ordained to receive him, which petition is granted.

Edinbr. 9 March 1674, present in the Court, Athol, Justice Generall, the Lords Colington, Nairn, Newbyth and Craigie.

Petition by the surgeons and apothecary Chirurgeons of Edinbr. to be free of passing Assises.

This day there is a petition presented by John Joussie, Deacon of the Chirurgeons, for himself and in behalf of the remanent members of the Incorporation of Chirurgeons and Chirurgeon Apothecaries within Edinbr. making mention that where his Majesty and his Royall Ancestors conform to the laudable custom of other nations for advancing the necessar arts of Chururgery and ffarmacy within this kingdom and encouragement of expert and qualified men to follow and practise the samen, have by severall Acts of parl. and concessions under their Royall hands, indulged to the Incorporations of Surgeons and Chirurgeon Apothecaries within this Realm, severall priviledges and immunities, and particularly by a Letter of Exemption made and granted by umq̃ll. Q. Mary under the privy seal of date the 11th May 1567, the Chirurgeons inhabitants within the burghs of this Realm are liberate and exeemed from all compearance and passing upon

Inquests and Assises in Actions Civil and Criminall, either in Justice Aires, Justice Courts, Sheriff Courts, Burrow Courts, or any other Courts, for serving of brieves, apprising of lands, or any other manner of actions whatsomever, except in sua far as concerns their Judgement and sight of the said Craft allenarly. And all Judges whatsoever within this Realm are discharged from attacking, arresting, or any ways troubling or molesting them for their remaining at home, and not passing upon the saids assises, which Letter of Exemption together with severall other acts in their favours anent their liberties and priviledges, are ratifyed in parl. by his present Majesty in his late parl. *in anno* 1670. Notwithstanding whereof severall members of their Incorporation are daily troubled and molested by the officers of the Court of Justitiary and summoned to compear upon assises, which tendeth to their great prejudice and diverteth them from giving that ready and punctuall attendance to their patients to which they are obliged and which their condition of health may frequently require and which cannot admitt of a delay. And thereby his Majesty's royall favour towards them is rendered altogether ineffectuall. Therefore craving the saids Lords would be pleased to take the premises to their consideration and for their security as to the future, to declare their said priviledge and immunitie frae compearing and passing upon any assises in time coming, by an Act in the books of Adjournall, and to discharge in all time coming their officers of Court from summoning any of their Incorporation to pass upon Assises, conform to the forsaids Acts of parl. in their favours as the said Supplication bears. And for instructing thereof produced a charter of Exemption under the Privy Seal granted by Q. Mary in favours of the Chirurgeons of this realm then present and their posterity of the date the 11th May 1567, whereby the Queen's Majesty for the causes and upon the considerations mentioned in the samen gift and Letter of Exemption, gives and grants license to all Chirurgeons, inhabitants within the Burrows of that realm then present, and to their posterity being for the time Chirurgeons, which are able and qualifyed persons after examination before the Deacon and Brethren of that occupation within the Burgh of Edinbr. shall be found able and worthy to use and exerce

the said craft and no others, that they shall be free from all compearing and passing upon any Inquests or assises in Actions Criminal or Civil, Justice Aires, Justice Courts, Sheriff Courts, Burrow Courts or others, for serving of Brieves, apprising of Lands, or any manner of actions whatsomever, excepting so far as concerns the Judgement and Sight of their said Craft allenarly. Discharging also all and sundry Justices, Justice Clerks, Treasurer Clerks, provosts and aldermen and baillies of Burrows, and all other officers and ministers of the Law and their Deputes then present and to come frae all calling, attacking, arresting, summoning, adjourning, poynding, troubling or intrometting with the saids Chirurgeons then present, and their successors in that Craft or any of their lands or goods in any ways in time coming for their remainsng at home and not passing upon Assises and inquests as said is, except as is before excepted and of their offices in that part for ever. As the samen gift and Letter of Exemption of the date forsaid, containing therein severall other priviledges, libertys and exemptions in favours of the saids Chirurgeons, ffreemen and inhabitants, within the Burrows of this Realm in it self at length bears, as also produced a Ratification thereof, granted by K. Ja. 6 of ever happy memory, to and in favours of the saids Chirurgeons, under the privy seal, dated 6 June 1613, together also with an Act of Parl. dated 22 August 1670, whereby our Sovereign Lord and the Estates of Parl. for the causes therein contained, ratifies and approves the forsaid gift and exemption granted by Q. Mary in favours of the saids Chirurgeons, and also the forsaid Confirmation and approbation thereof, granted by K. Jam. 6. in their favours. As also ratifies, approves and confirms all other gifts, grants, decreits, acts of parl. and Courts, acts of Burrows and town council of Edinburgh, and haill ratifications thereof, in favours of the said Incorporation anent their Liberties and Rights in the haill heads, clauses, provisions, articles, circumstances and conditions thereof, dispensing with the generallity thereof.

The Lords Justice Generall and Commissioners of Justitiary having considered the forsaid petition, together with the said Charter of Exemption and ratifications thereof @specified, discharges all messengers at arms, macers of Court and other

officers whatsoever, from citing and summoning any of the Chirurgeons to pass upon assises and inquests, in actions Criminall in time coming, and that conform to their gifts and others @specified.

Edinbr. 17th March 1674.

The Lords Commissioners continues this Court and haill Diets of the same till Wednesday the 25th instant, and ordains the assisers to attend each person under the pain of 200 merks.

The said William Lauriston, incarcerate at the instance of Alexander Cornwall in Borrostounness for Theft and the ravishing of his daughter, he having given in his petition is liberate upon his finding Caution to answer.

Edinbr. 25th March 1674.

The Diet at the instance of his Majesty's Advocate against Mr. James Mitchell, is here deserted, as I marked beside his lybell.

Advo: agt. Russell, Robertson, ffraser and Ross, continued.

Petition Carmichall agt. Auld and Baillie for Murder.

Eod Die. There being a petition presented by Anna Carmichall, sometime indweller in Edinbr. and James Treipland her spouse, against Jean Auld, spouse to James Arbuckle, and James Baillie their prentice, anent the beating, bruising and murdering of their son, craving that the confessions of parties and depositions of witnesses taken by the Magistrates of Edinbr. may be exhibite by them and their Clerk, to the effect that they may address to the King's Advocate for raising of a criminal lybell against them that they may be brought to a triall thereanent.

The Lords Commissioners of Justitiary remitted this Bill to my Lo. Advocate and recommended him to gett up these Depositions from the Magistrates, to the effect @written.

Eod. Die. John Aikman who had been prisoner three years in the Tolbooth of Edinbr. at the instance of Alexander Bruce of Broomhall for alledged stealing of a horse, gives in a

Petition to the Lords, craving that he may either be tried or sett at liberty upon caution. The Lords ordains him to condescend upon the Cautioner and the King's advocate to see, and the same being seen, ordains him to be sett at liberty upon Caution.

Edinbr. 1st and 4th June 1674.

Threepland agt. Jean Auld, spouse to James Arbuckles for the murder of her son, continued, and Caution of Lawburrows ffound by her to the Defender wherein Robert Brown is the pannell's cautioner and Mr. William Hamilton, writer in Edinbr. attestor. Threepland agt. Auld.

Eod. Die. Elizabeth Nisbett, servitrix to the Laird of Craigmiller against George Simpson of Idoch for theft of a ring, some woups and money and back cloaths, belonging to the pursuer, which she had lying in a chest in the house of ffyfie *in anno* 1673, when she attended Lady Anna Seton, sister to the Lord Dunfermling, whereof he restored a part, but keeped the rest. Continued in the first of these days but deserted in the 2d. Nisbet agt. Simpson.

Advocatus agt. Margaret Clerk spouse to John Runsie in Seton of Cullen, for witchcraft, continued the said second day and deserted the third. This cause is first advocate.

Item Threepland agt. Auld and Baillie for the slaughter mentioned 25 March on the other side, deserted and the pursuer and her Cautioner unlawed for not insisting.

Edinbr. 8 and 10 June, 1674. In the first of these Diets the Lord Castlehill present, and in the second of these Diets the Justice Generall and all the five Commissioners of Justitiary present.

The Lord Castlehill upon the first of these two Diets, continues the Court and the haill Diets thereof in generall to the 10th day.

On the 10th day James and Alexander McIntoshes, sons to umqll. John McIntosh of fforther, Thomas ffleeming, David Guthry, and David Garters, their servants entered the pannel, Farqrsons agt. McIntoshes for Slaughter.

are indited and accused at the instance of the King's Advocate and Helen Ogilvie, relict of umqll. Robert ffarqrson of Burghderg and John and Alexander ffarqrsons, their brothers, that notwithstanding Convocation of Leidges or any number of them in arms, wearing of guns, pistols, halberts and other fire works and the invading and assaulting, beating, blooding, wounding and killing of any of the leidges, specially in fforethought malice, are crimes of a high nature, punishable with death and confiscation of their moveables, as also the houghers and slayers of nolt, horse, and other cattle are punishable by death and confiscation of their moveables, and particularly by the 82 Act 11 parl. and the 110 Act 7 parl. Ja. 6, it is statute and ordained that all slayers and houghers of horse, nolt and other cattle in time coming shall be called before the Justice or his Deputes at Justice Aires on particular Diets, are punishable therefore with Death and confiscation of their moveables. And sicklike the crimes of Theft and Resett of Theft are punishable by Death, and also the crime of hamsucken and entring violently and beating and wounding of them, is punishable with Death and confiscation of their moveables, nevertheless it is of verity that the saids James and Alexander M^{c}Intoshes, upon the of August 1670, pursued the said Robert ffarqrson for his life within the parochin of Glassorie, whereof he was taxman, upon design to have killed him, and thereafter because they missed their design there, the saids two and remanent defenders their servants killed him as he returned from the place of fforther to his own dwelling house, and that by giving him severall mortall wounds in his body, as is at length contained in an former lybell, the heads and substance whereof is sett down. The lybell contained diverse other crimes subsumed upon the proposition which is not necessar to mention because when it comes to be debate, Mr. David Thoirs for the pursuers declares that they insist only *hoc loco* against the haill pannells for the murder of the said Robert ffarqrson of Burghderg and against James and Alexander M^{c}Intoshes for the theftous taking of the two horses from the said Robert ffarqrson, and for the wounding of John ffarqrson and leaving him dead upon the ground.

Mr. John Eleis, for the pannell, contraverts not the first and third poynts insisted on, anent the slaughter of Robert and John ffarqrsons, but only propones a defence against the second part viz. the theft of the two horses, as to which he alledges that this is *res hactenus judicata*, and the pursuers' interest is thereby extinct, because the deceast Robert ffarqrson having pursued a spulzie against the pannell's father for away taking of these two horses, there was Decreet recovered for the same, and bond granted for the violent profites. 2° Denying the lybell, its offered to be proven, that if the pannells did intromett with these horses, they were given up by them to the sheriff as waff goods, being found in loss graison and accordingly were made use of by the sherriff.

Replys Mr. David Dunmuire that the Defence ought to be repelled, 1° Denies there was any such Decreet of Spulzie. 2° *Esto* it had been, yet that is but a civil action and cannot hinder the Criminall, which is *ad vindictum*, and is conform both to the Civil Law and daily practicque, and to the last member of the Alledgeance, bearing that the goods were waff, the same ought to be repelled as being contrary to the lybell which bears that they were in Robert ffarqrson the owner's possession, and if any goods was delivered to the Sherriff as waff, it will be found they are different goods from those lybelled. And Sir Robert Sinclair by his addition to this defence for clearing they were not waff goods, offers to prove positively they were taken out of Burghderg's possession, and when one of the pannells had at a time before offered to take them away and was hindered by Burghderg, all the pannells returned with a greater party and carried them out of his possession by force.

Duplys Eleis, that he oppones his Defence which is relevant notwithstanding of the Answer, for tho the Advocate may pursue *ad vindictum* notwithstanding of the Decreet of Spulzie if the letters had been principally at his instance *pro vindicta publica*, yet it being also at the instance of the nearest of kin of the party prejudged, the former Decreet obtained for the violent profites and the security given therefore does exclude the action. And to the second part of the Reply, oppones the

Defence also which as it is circumstantiat is sufficient, it being inconsistent that goods should have been delivered to the sherriff as waff and yet theftously stollen at the same time, and therefore the Defence as it is qualifyed with the circumstances ought to be sustained.

Interloqr The Lords Commissioners of Justitiary ffinds that part of the lybell first insisted on anent the slaughter of the deceast Robert ffarqrson of Burghderg, relevant as its lybelled, and remits the samen to the knowledge of an Assise. And as to the second member of the lybell insisted on, anent the Theft of the two horses, the Lords ffinds the samen relevant, as also ffinds the second Defence proponed against the samen also relevant, and remitts both to the knowledge of an assise, and likewise ffinds the third member insisted on anent the wounding and blooding of John ffarqrson also relevant, and remitts the same to the knowledge of an assise.

The Assise elected and sworn, no objection to the contrary. The Lord Justice Generall being withdrawn necessarily, the Lords elected Strathurd præses.

Objection agt. witnesses. Sir George Lockhart for the pannells objected against the witnesses who were present to be adduced, that they could not be received because the execution does not bear that the list of them was given to the pannell or left at the mercat cross, but only left at the pannell's house.

Replys Sir Robert Sinclair, that the leaving it at the pannell's house was sufficient, being done 15 days before the day, compearance as the execution bears because the only end of delivering a list is to certiorate the pannells what witnesses are to be led, and the leaving the list at the dwelling house is sufficient for that end.

Duplys Lockhart, that he oppones the regulation which ordains that when any Criminall lybell or summonds of exculpation are given and execute against any party, that at the same time lists of witnesses adduced for proving of the lybell or exculpation be also given, and which is so to be understood that they be given in the same way and manner that the Citation is given, for as a party cited at his dwelling house and the mercat cross may know the last citation and not of the first, and therefore can only be declared fugitive,

when both these citations are given, so that he may get knowledge of a list of the witnessess left at the mercat cross, and not of a list left at his dwelling house, and therefore all Citations are not valid, not being done at both these places, so no more is a list of witnesses valid except they be left at both these places, for both ought to be done with the same solemnity.

The Lo : Commissioners of Justitiary notwithstanding of the Defence and Duply, finds the List given at the dwelling house sufficient.

I have considered the probation and all that I find proven is that Burghderg was killed and his son wounded but *non constat* which of the pannells did it. It is proven that the pannells were in arms and that there was shots among the parties, but it is not proven who shott first. It is also proven that the defunct and his party had their swords first drawn. All this with the pannells their being imployed in the execution of a Caption against the Defunct, did contribute for the justification of the pannells.

The Assise by the mouth of William Veitch their Chancellour fand the pannells clean from the crimes insisted on.

Edinbr. 7 June 1674.

James Meldrum of Hatton, Cautioner for William White in Auchterless, unlawed for not reporting of the Criminall Letter purchased at the said William White his instance with concourse of his Majesties Advocate against Captain Patrick Ogilvie, brother to the Earl of ffindlator, Walter Ogilvie sometime his servant, and James ffinnie in ffordyce, for beating, wounding, and shotting of the said William Whyte in manner mentioned in the Criminall Letter, and in respect of the Defender's their compearance to underly the law. The Diet was deserted, but James ffinnie, one of the defenders absent, is declared fugitive and his Cautioner unlawed.

Edinbr. 15 June 1674. All the five Commissioners of Justitiary present and the Lord Newbyth præses.

The whilk day William Garden of Balimore agt. the tenants

and servants of the E. of Aboyne, indited and accused, that albeit the crimes of Robbery, Theft, Stouthreiff, Reset of Theft, Covocation, beating, wounding and oppressing are crimes of a high nature, severely punishable, and particularly by the 98 Act. 6 par. Ja. 4. it is statute and ordained that in time to come no manner of sherriff or officer poynd or distrenzie the horse, oxen, or other goods pertaining to the pleugh, and that labours the ground the time of labouring of the same where any other goods or lands are to be poynded or apprised, nevertheless the pannells are guilty of the crimes @mentioned, in sua far as first in the of December 1673, Patrick Smith, servitor to the E. of Aboyne, and the other defenders lybelled, came in fear of war to the lands of Branlyne in Glentaner and stealed from the pursuer seven cows, nine oxen, two horses, being all of them pleugh goods and then imployed in labouring the ground, and being but a day or two before the taking thereof, loosed out of the pleugh, and carried the same away and disposed thereof upon a pretence of poynding, notwithstanding that the price was offered, and that there were other poyndable goods upon the ground at the time, as also Alexander Ross, John Ross his son, and the other Defenders lybelled with a Convocation of the Leidges lybelled, did on the 16 ffebry. last, take away from the Complainer his said lands, two oxen, two cows and a black horse at the prices lybelled. And upon the 18 June 1673 the said Patrick Smith, servitor to the Earl of Aboyne, and some of the defenders lybelled, accompanied with 2 or 300 horse and men did seize 500 load of wood (which the pursuer had provided for his winter firing) and carried it from the pursuer's house, where it was lying, to the house of the E. of Aboyne, and did pull Jean Pearson, the pursuer's wife, from a stack head and threw her upon the ground.

And likeways 10 June 1673, Alexander Gillanders and some other of the defenders, did steal a cow from the Complainer off the said lands. And in August 1666, James Catanach another of the defenders, invaded the pursuer with a drawn sword and would have killed him if the pursuer had not decerned him, and after he was decerned he did wound the pursuer in the head to the great effusion of his blood. And in

the year 1673 or 74, days and months thereof lybelled, Robert Milntoun in Borland, another of the defenders, by himself, his servant and accomplices, did trouble the pursuer in his possession of the lands and wood of Glentaner and Branlyn, and masterfully opprest him and his tenants lybelled, by taking from them their axes and other instruments, whereby they were cutting wood, and that after Lawburrows was duely served at the pursuer's instance ag^{t} them. And upon the 4th November 1658, Alexander Chrystieson in Dungask, another of the defenders, came to the saids lands of Branlyne, and there did violently rob from him an ox, two pistols and a durk, and did violently wound him with the durk. And in Aprile 1672 the said John Gillanders did rob and take away a gun from Robert Strachan, the pursuer's servant worth 100£, which belonged to the pursuer. And in November 1672, John Barrie, boatman att the Milne of Dennitie, did violently invade the pursuer and rob him of his pistol. And in June 1667, Alexander George, messenger in Aboyne, another of the Defenders, came to the pursuers said lands of Blanlyne and did loup his yard dikes and steal from him a gelding worth 400 mks. Of the whilk crimes of Robbery, Stouthreiff, resett of Theft, poynding of pleugh oxen in time of labouring when there were other goods to be poynded and lands to be apprised, and the forenamed persons and ilk ane of them are actor art and part, which being found by an assise, they ought to be punished.

Mr. William Murray for the Defenders alledges as to the first article, that the goods therein mentioned, were lawfully poynded by vertue of Letters of Horning direct from his Majestie's privy Council, dated 20th December 1673, and apprised upon the ground of the lands the 22d day thereafter. As to the pretence that they were pleugh goods the time of labouring, its answered that the poynding was in the time of the great late storm, which was no time of labouring. 2^{o} The execution bears that there was no other goods upon the ground the time of the poynding.

As to the second article of the lybell, its answered, that the saids goods were poynded by Alexander Ross in payment of ffourty pounds, contained in a Decreet at his instance

after the days of the charge were expired, as the Decreet and execution of poynding bears.

As to the third Article, the fire wood therein contained belonged to the E. of Aboyne and was cutt in his own wood of Glentaner and upon his own expences when he was cutting timber to build his house, and the pursuer having meddled with it the Earl gave orders to take it back again, in doing thereof *utebatur jure tantum suo*, and he as warrantably as one who takes back his goods from Thief. And as to the second part of this article anent the beating of the wife, its answered that its offered to be proven that the wife did first assault and invade them, and any thing they did was but in their own defence and to repulse her violence.

As to the 4 Article, Mr. William More answers, that upon the 15 May preceeding, there was a Decreet obtained against the pursurer for an unlaw for his absence from the head Court, and being charged to make payment within fifteen days after the charge, the goods were lawfully poynded conform to the Executions produced.

As to the 5 Article, the Defender James Catanach is absent and fugitive. As to the 6 Article its most irrelevant in sua far as the said Robert, being the Earl of Aboyne's forrester had a sufficient warrand and good right to impede him from cutting his own woods, having oftentimes forbid him to cutt.

As to the 7 Article, the samen is calumnious and it being customary in the Highlands when any person wants goods or has them stollen from them, whenever they can apprehend the same and be able to make appear that they were their own, they use to cutt off one of their ears and then intents legall proces, which being done by Chrystieson, he was not only impeded from taking back his own ox, but also was menaced and threatned by the pursurer who theftously keeped the samen, and as to the wounding in the shoulder, its denyed.

As to the 8 Article, its answered that the Earl's tenants and the whole countrey being troubled with depradations from the Highlanders, the Earl of consent of his ffewars and Tenants did agree that there should be a watch established

of a Captain and twelve men, and all the inhabitants were ordained to concurr upon advertisement in resisting the broken men. And it being enacted in court that all who should be absent should be unlawed, and the pursuer William Garden being personally summoned to concurr, haveing refused, the truth is the Captain of the watch, John Gillanders did make use of the gum to arm some of these who wanted arms against the broken men, in which expedition there was three principall robbers taken, who were hanged att Aberdeen within three days thereafter.

As to the 9, the pannell is absent. As to the 10, there was a Decreet obtained against the pursurer in the Earl's Court for 61 merks of ffeu duty due to the Earl, whereupon the pursuer being charged, the horse was lawfully poinded, which Decreet is dated in Aprile 1667.

Replys Mr. John Steuart for the pursuer, to the Answer made to the first, the pretended poynding cannot be respected, for whatever warrand could be for poynding other goods, yet it could be no warrand to poind pleugh goods the time of labouring. As to that part of the Answers bearing that the poynding was in the time of a great storm and that there was no other goods to be found either poyndable or appriseable, its Replyed to the first part thereof, that the law does not distinguish, so no more do we, the Act of parl, expressly dischargeing the poynding of goods in time of labouring, this pretended storm (always denying there was any such) being in December, the exception can be of no force. And as to that part, that there was no other goods, offers to prove that there was. Likeas the pannells cannot found any thing upon the forsaid pretended poynding, except they could say it was lawfully execute by apprising the same, both upon the ground and at the Cross, where neither the party nor any for him were compearing and offering the contents of the Letters, viz. 100 merks contained in the Act of Council and sherriff effeiring thereto. Likeas its offered positive to be proven that the son in law and his ordinar procurator at Aberdeen offered in his name ffirst a bagg that contained both 100 merks and 3 lb Scots, and because of the parties refusing to accept of it without

numeration and down telling, the saids haill sumes was numbered and down told and offered, and the offer refused.

To the Answers made to the 2d Replys, the Decreet and poynding following theron cannot be respected because its offered to be proven that the pursuer being pursued, at least being present at the E. of Aboyne's Barron Court and conveened for a wood unlaw at the same time without any other formality of complaint or a Citation, the said Alexander Ross desired Justice for £40 Scots which he alledged he had paid for the pursuer for some witnesses expences, at which time as he was decerned for the wood unlaw, so was he for the £40, whereupon he immediatly repairs to Edinbr. and suspends both, and did intimate the suspension to the parties personally apprehended, and that the Intimation might be the more secure, he catches the occasion where the baillie himself was, and made him witness to the said Intimation. So that the said 40 lb being suspended and the Intimation thereof made to the Judge, it put the party *in pessima fide* either to poynd upon the said Decreet or pursue the same cause before the same Judge, of purpose to evite the said suspension, seeing it was lawfully intimate as said is.

Likeas whatever be the sum contained in the forsaid Decreet, whether 40 or 80£, its offered to be proven by the pannell's own oath that all that was craved at that time was for witnesses expences. Likeas the Decreet it self is most clear.

To the third its Replied that the Answer is most irrelevant, seeing its offered to be proven that the wood taken away from the pursuer was wood cutt by himself in the bounds of the Woods of Glentanner and others wherein he stood expresly infeft, at least by his Charter and Ratification thereof, by way of contract the said pursuer has express liberty to cutt in any of the saids woods conform whereunto, having cutt, brought and stacked the said wood, he possest the same for the space of three months and without committing of a manifest crime no man durst take away the said Wood. And the Defence it self, that it was the E. of Aboyne's wood cutt by himself and his tenants, and so that he might have

sent as he did for recovering of his own goods, as it had been from a thief, the lybell it self is opponed against which the Defence is expresly contrair, and altho it had been the Earl's own wood cutt by himself, yet being so long in his possession, it could not be taken away but *via juris*.

To the Answer made to the 4, the lybell is opponed which is no ways elided by the Answer. And as for the pretended poynding, it cannot be respected, because by his Charter, at least by the Contract @mentioned the pursuer is only to answer such head Courts upon lawfull Citation by the Decreet it self, which is the warrand of the poynding, its evident he was not cited.

Likeas the same was not an head Court, nor could there be a head Court at the same time.

To the Answer made to the C, its replyed that the Lybell being founded upon the pursuer's being in possession of cutting of wood for his own house and his tenants, and being at the time lybelled by himself and his servants cutting the wood, the E. of Aboyne neither be himself nor his fforrester could have so far hindered the pursuer and his servants from cutting their own wood, by taking away their axes, so as the Earl himself could not have taken away his axes, no neither could the florrester by his warrand.

As to the Answer made to the 7 Article, the pursuer restricts the samen *ad pœnam ordinariam*, its replyed that the Answer ought to be repelled in respect its offered to be proven that the pursuer having an ox that went astray and after earch having found the same, the pannell came and without any order of Law imaginable, beat, strake and wounded the Complainer in manner lybelled, in defence only of his own stott and the stott that was in his own possession, and took away his durk and pistoll.

To the Answer made to the 8, its replyed 1° To the pretence that there were a watch appointed by the Earl of Aboyne, and a captain with power to his officers to amerciat the refusers to concurr in the said watch in a fine, and immediately to poynd therefore, and the pursuer refused to concurr with the watch, the gun was poynded, the Defence is

no ways relevant in respect no Barron Baillie at his own hand and his own Court without express consent of his vassalls could tye them at his own pleasure to the performance of such and such deeds, under such and such penalties, otherways ffew charters as the pursuer's is, which bears a certain *Reddendo pro omni alio onere*, would be ineffectual.

To the 10, its Replyed, the poynding cannot be respected, because 1° it proceeds upon a Decreet that bears no Citation, but upon the contrair bears a head Court in the beginning and with a new merk in the end of the said Decreet or Act of Court the pursuer is decerned to make payment of the sum of three score merks as resting by him of ffeu duty, so that the Decreet being null wanting a Citation, and the poynding it self wanting the solemnity of apprising the goods upon the ground and at the Mercat Cross and the offer of the sume for the horse poynded, the poynding cannot be respected. Likeas all the bygone ffeu, which is the lybell of the Decreet, was payed and discharged.

Duplys Sir George Lockhart, that notwithstanding of the pretences in the Reply, the Defences stands relevant, only the Dittay cannot be putt to the knowledge of an Inquest, for as to the first, oppones the poinding, and tho they had been pleugh goods and the time of labouring, yet in law its no crime, the Act of parl. only prohibiting the same, which can import no more but a spulzie or the illegality of the Act. As to the second, oppones the same, and the pretence that there was a suspension intimate, is frivolous, in regard its evident by comparing the suspension and Decreet, it does not meet, but are *Disparata*.

As to the 3, the Defence is relevant because the Defender offers to prove that the wood taken away was the Earl's wood, it being cutt in his wood for his use, and which the pursuer having most unwarrantably intromitted with, the pannells did no wrong in taking it back. And it is absurd to pretend that any such intromission *etiam ex intervallo* can import theft or robbery, which is *fraudulosa contractatio rei aliena* unless some other had *jus aliquod in re aliena*, which cannot be here pretended, and the most that the law allows were to restore but the possession, but can import no crime, no more then if

one's horse were stollen the true proprietor should take him back. And in the generall its certain in law that *voluntas et propositum discingunt maleficia et quæ vis causa etiam si fatua excusat a dolo vel crimine.*

As to the 4, oppones the poynding and the Decreet, which is only quarrelable by way of Reduction and can import as crime.

As to the 6, the Defence is likeways relevant, the Defender being the Earl's fforrester, and by the Tack produced, being impowered and obliged to preserve the woods and to hinder the cutting of the same, it liberates the Defender from all Crime. As to the pretended liberty of cutting, its not relevant to inferr a crime against the Defender. 2° The liberty is restricted for the pursuer's use and could be no warrand to cutt young and green wood. 3° The pretended right produced cannot be respected because the Earl has obtained a Decreet of Improbation against it, as appears by the ratification produced.

As to the 7, repeats the Defence, and its neither lybelled nor can be pretended that the ox was taken away, but only marked.

As to the 8, repeats and oppones the Defence, and the Act produced was in it self most just for the good and security of the vassals and tenants (and as the Act bears) made with their consent, and which tho it were questionable upon any ground of nullity, as certainly it is not, but on the contrary does evidence the Earl's exemplarly case for repressing these insolent depredations and robberys, yet the said act is more then sufficient to liberate *a crimine* seeing *quæ vis causa excusat.*

As to the 10, oppones the Decreet and poynding, and which being for feu duties, it is sufficient, and the discharge of the few duties produced, is half a year thereafter.

Triplys his Majesty's advocate to the Debate anent the first Article, That the taking away of pleugh goods in time of labouring is a crime of a hainous nature, not only amounting to oppression, which by our law and acts of parl. is *crimen extra ordinarium*, and whereupon Dittay is to be taken in respect the taking away goods in time of labouring, does not

only import the parties prejudice and loss of the goods but ruine, heirship and want of the Cropt if he have not goods to labour. Likeas the taking away of the goods of the quality forsaid the time of labouring, is not only prohibite by an express act of parl. and so is an unlawfull act and a crime, and ought to be punished, and if otherways, the act should operate nothing seeing Spulzie before the said Act was a ground of a civil pursuit, but in effect is *furtum* or *rapina*, being *contractatio rei alienæ* and of that which could not be pretended, nor could be the subject of poynding such goods at such a time, not being poyndable, especially seeing there did concurr and interveen with the said unlawfull act, a Convocation of a number of armed men as is lybelled. And whereas its pretended that tho there had been an offer of money the time of the poynding, and tho the same had been refused, and that the taking away of the goods could only be a ground of spulzie and civil pursuit, and the execution of the poynding bears that the goods were offered, so that the alledgeance of the offer of payment is not relevant, it is answered that from the same Deed there may arise both a criminall and civil Action, and its in the option of the pursuer to make use of any specially where there is so aggravating circumstances, so great a number, and Convocation of armed men, which is neither usuall nor ought to be lawfull in poynding. And where it is evident that under pretence of a legall Dilligence of poynding a downright oppression was intended to be coloured, seeing the pursuer was charged in Edinbr. to pay within six days the sum of 100 merks, and before he was come out of Edinbr. the poynding was of purpose precipitate before he could come home and take course for the said sum. And there is lybelled not only one simple act but a complication and series of severall acts and deeds of oppression. And it were beyond all measure hard that when poor gentlemen in the countrey are opprest upon pretence of Decreets and Acts of Court for unlaws, that they should have no other remedy but to pursue Reductions which are so expensive and tedious, especially in this time since the regulation. And the offer of the money is not contrary to the execution, seeing the same bears only that the goods were offered and not the payment

of the sumes contained in the poynding. And altho it had born that payment was not offered, its but a negative and the pursuer offers to prove positive that his son in law had money at the Cross and offered it. And farder its instanced that the same Defence being proponed in the case of the Lord Rentoun agt. Lanthill, it was repelled, and that the goods was poynded in time of labouring was remitted to the knowledge of an Assise.

To the 2d, oppones the Suspension and the Decreet, being both *ad idem* as to the 40 lb.

To the 3d, the former Answer is opponed and the alledgeance is no ways relevant, for the said Wood had been cutted for the E. of Aboyne's use, yet *ex tanto intervallo* after three months at the least two or one, the pursuer was in possession of the same, it was an high act of Depredation to offer to take it away with a Convocation of fourteen men and upwards.

As to the 4, whereas a poynding and a Decreet for the Warrand of the same is pretended, the Decreet produced could be no Warrand, and is intrinsically null in sua far as it does not bear that the Defender was cited or charge given against him or any shadow of formality whatsoever. As to the poynding its evidently null, seeing the goods were not apprised at the Mercat Cross, especially seeing the pursuer is not obliged to appear at head Courts unless he be cited.

As to the 6, Triplyes the pursuer being warranded by his infeftment to cutt wood, the Defender neither ought nor could hinder him to cutt wood upon pretence of any warrand contrair to his right, and as to the pretended certification, it cannot be respected seeing it appears by the act itself that the right whereupon the pursuer's Reply was founded anent his right to cutt wood, was produced and no certification granted against the same, and its offered to be proven that the pursuer's predecessors have been in possession of cutting of these woods by the space of 40, 20 or 10 years. And the Certification had been gotten against him, he was not obliged to quitt his possession without a Decreet of Removing.

The Lords Commissioners of Justitiary having considered Interloqr. the first Article anent the alledged poynding in forbidden time the seven cows, nine oxen and two horses, together with the Defences founded upon the poynding, they ffind the said

Article most proper to be discust before the Civil Judge in the first Justiciary. As also remitts the 2d Article anent the 40 lb. Suspension to the Civil Judge. And in like manner the 3d Article anent the 500 load of wood. And sicklike the 4 Article anent the reid Cow and calf. And also remitts the 6 Article anent the taking the pursuer's axes and instruments, to the Civil Judge, and ffinds the 7 Article anent the robbing and away taking of a black ox, and anent the away taking of the two pistolls and durk, and also anent the wounding of the pursuer all relevant *separatim* ilk ane of them to inferr *pœnam arbitrariam* as they are declared by the pursuer's procurators, and remitts the same to the knowledge of an assise. As also ffinds the Defence proponed against the same, in sua far as its alledged that the ox belonged to the pannell, likewise relevant, and remitts the same also to the knowledge of an Assise. And as to the 8 Article, anent the taking away the gun, and 10 anent the taking away the horse, remitts the same to the Civil Judge.

After pronouncing of this Interloqr, the Lords with consent of both parties deserts the Diet as to the 7th Article against Alexander Chrystieson.

The Earl of Aboyne against William Garden of Ballmore and his tenants and servants for cutting and stealing of green wood, deserted to the vi instant.

Dalmahoy agt. Mason, slaughter.

Eod. die. Margaret Dalmahoy, relict of umqll James Ralstoun, glasier in the Canongate, against William Mason, prisoner, for the slaughter of the said James Ralstoun, continued till the said vj instant.

Adv. agt. Donaldson.

Eod. die. His Majesty's Advocate against James Donaldson, merchant in Elgin, for the using of false weights and measures, continued.

Dennistoun agt. Maxwells.

William Denniestoun of Cowgrain against John Maxwell of Blackstone and John Maxwell, merchant in Paisly, for wounding and mutilating the said William Denniestoun, continued till the vj instant.

Advo. agt. Clelland, for Theft.

Lo. Advo. agt. Clelland in Eastshiell for Theft alledged committed by him in stealing 20 sheep or thereby and severall

horse furniture. The Lords Commissioners of Justitiary in respect there was none present to insist against the Defender, deserted the Diet and discharged the outgiving of any New Letters against him for the crime lybelled, except by an speciall Warrand *in presentia*, whereupon the said John Clelland asked and took Instruments and protested for the relief of John Baird, indweller in Edinbr., cautioner for his appearance, which accordingly was admitted.

His Majesty's Advocate and James Somerveill, usher in Exchequer, his informer, against Archibald Robb, mealman in Glasgow, for Adultery alledged committed by him with Janet Wright, indweller there, declared fugitive, and all his moveable goods and gear ordained to be escheat and inbrought to his Majesty's use, for his not compearing to the effect @ specified. Somerveill agt. Robb.

Eod. die. The Lords ordains the Chirurgeons of Edinbr. who sighted the wound of the deceast James Ralstoun, glasier, in the Canongate, inflicted upon him by William Mason, to give in their Judgement in write thereanent and that upon the petition of the said William, alledging it was but a slight wound and no ways in a deadly place.

The Lords upon a petition given in to them by Patrick Crawfurd, one of those who were cited to pass upon the Assise of James and Alexander M^{c}Intoshes desiring that the act ffyning him for his absence may not be booked because he was not absent through contempt. They grant the desire of the bill and discharges the Clerk to book the Act of Unlaw and amerciament.

Edinbr. 17 June 1674.

The Lords continues the Court and all the Diets thereof till to morrow.

Edinbr. 18 June 1674.

William Denniestoun of Cowgraine and his Majesty's Advocate against John Maxwell of Blastoun and Maxwell, indweller in Paisley, indited for assasination and mutilation in sua far as the said John Maxwell in Paisley, having borrowed Denniestoun agt. Maxwells assasination and mutilation.

his sword from the other John Maxwell, he did therewith assasinate the Complainer at the house of Alexander Home in Paisley, when he was pissing at a wall in Paisley, and therewith did wound him in the brow, and having thrust him to the ground, did wound him in the arm and leg. All which he did *tanquam insidiator et per industriam* and by way of fforethought fellony, and being taken and incarcerate at the Tolbooth of Paisley and questioned for these deeds he proudlie declared the thrust he gave in the head was intended for the heart, whereby the said John Maxwell in Paisley is guilty of Murder and Assasinate by way of fforethought fellony *tanquam insidiator et sicarius*, and the other John Maxwell is guilty of command, instigation, hounding out and ratihabition. Which Action being called upon the 15 instant, compeared James ffreeland and produced a procuratory from the pursuer to insist, and his advocates compearing, produced the Criminall Letters and the pannel compearing the Diet was continued till this day, at which time the Action being again called the Lords deserts the Action of consent of both parties, and New Letters are discharged to be given out but by a speciall warrand of a quorum of the Lords, and in respect of the pannell's compearance as said is the Lords grants Warrand to the Magistrates of Paisley to deliver up to him and his Cautioner the Band which they exacted from him for his Compearance at Edinburgh.

Advo: agt. Donaldson.

Advocatus agt. James Donaldson, merchant in Elgine for using of false weights, deserted, and Thomas Urquhart of Earnstoun is unlawed for not reporting the Letters and Insisting.

Edinbr. 22 and 29 June 1674.

The Earl of Aboyne agt. William Garden of Ballimore, his servants and tenants for cutting of Green Wood deserted, because the pursuer was not ready to insist and the Earl finds caution of Lawburrows to the said William Garden, W^m^ having given his oath judicially that he dreaded him bodily harm.

No more in these Diets but Continuations and petitions for the expences of witnesses.

Edinbr. 6 July 1674.

Ralstoun agt. Mason and procurator ffiscal of Kirkcudbright against William Rannie, continued.

Alexander Cornwall in Borrostounness and Alex^r^ M^c^Ilroy, stabler in Edinbr. his Cautioner and Mr. William Dundass,[1] advocate, attestor, all of them unlawed for not reporting the Criminall Letters at the instance of the said Cornwall agt. William Laurieston for the rape of the said William's daughter.

The said day ffrancis Wood, Indweller in Edinbr. being incarcerate by the Magistrates of Edinbr. within their Tolbooth for alledged accession to the escape of his brother Hary Wood, out of the said prison, he gives in a petition to the Lords representing that the Magistrates had sent for him to his own house and had incarcerate him and that he was innocent, and that he was willing to find caution to find his brother within fifteen days, which Caution being found by him he is sett at liberty.

Edinbr. 13 July 1674.

Ralstoun agt. Mason for Slaughter.

William Mason, prisoner in the Tolbooth of Edinbr. indited upon the Criminall Letters raised at the instance of Margaret Dalmahoy, relict of the deceast James Ralstoun, glazier in the Canongate, her children and king's advocate for his interest, for coming to the house of John ffoubrester, hatt maker in Leithwynd, 13 ffebry last, where the deceast James Ralstoun was for the time, and there beating and bruising him and violently throwing him upon the edge of a Bunker, Chest or Chair, which did wound him in the left side of his head to the effusion of his blood in great quantity, whereof he died. And to evidence his farder malice offered to assault him again, crying out, Let him have his pennyworths for he knew his punishment. And in token of his guilt he procured himself

[1] Admitted advocate 25th June 1661. Re-admitted 21st Jan. 1665.

to be brought from the Tolbooth of the Canongate where he was prisoner for the same fault, to the Defunct's house where he was dying, and craved him pardon.

After reading of the whilk Inditement which was altogether denied by the Pannell, Mr. Laurence Charters,[1] Advocate, Procurator for the Pannell, produced an Exculpation raised by him by way of Defence, which bears that denying always he had any accession to the killing the Defunct, any thing he did was done in his own defence *cum moderamine inculpatæ tutelæ* and was also very improportiall to the effect charged upon, in sua far as he had no fforethought fellony nor precogitate malice nor the least rancour nor difference agt. the Defunct. Likeas the very day wherein the said Defunct was wounded, he and James ffender, wright in the Canongate, did follow the Defender from house to house, he shunning their company because he fand them in drink. And at last they followed him to the house of John ffoubister, hatt maker in Leith Wynd, and finding the Defender there sitting in a peaceable manner, without any weapon defensive or offensive, they after several provoking and reproachfull words, putt violent hands in his person, tear his band from about his neck and the hair out of his head and gave him a blow upon the face, the marks whereof remained for severall days thereafter. And not content with that insolence, they fell upon the Defender, and being assisted by some others, they threw him upon the ground and into the ffire, and if the Defender did at all thrust or occasion the fall of the said James Ralstoun, he was necessitate to do it that he might throw him off himself when he was lying below the Defunct, at least when he had violent hand in the Defender's person as said is, so that he fell not only by the said thrust but by his own drunkenness, and in his fall his head lighted upon the sharp corner of a chest or stool, which could neither be foreseen nor prevented by the Complainer. And if he received any wound in his head thereby, it was meerly accidentall and procured by the said Defunct himself, he being not only drunk in manner forsaid, but being also an aged and infirm person, newly recovered out of sickness.

2° It is of verity that the said wound of its nature

[1] Admitted advocate, 9th November 1668.

was no ways mortall, nor could the same be thought to be the proportionall and adequate cause of the said Defunct's death, in regard its offered to be proven that for a long time after he received the said wound he did use no cure thereto nor apply any thing to stop the blooding thereof, but that he, accompanied with his wife and daughter, went up and down the streets in a cold, frosty night, for the space of two or three hours thereafter, his head blooding all that time, and his wife being most earnestly desired by his daughter and others to take him home, she oft times answered that if he should blood to death he should never go home untill he were revenged of the Defender, and accordingly having stayed out late in the open air the forsaid frosty night, and having been thereafter imprisoned in the Canongate Tolbooth and nothing applyed to the forsaid wound all that time, he did thereafter within certain days contract a Defluxion with swelling in his face and throat, whereby his throat was closed up and he disabled to eat, speak or eat, of which Defluxion and swelling, and not of the wound, he died within twelve hours thereafter, according to the opinion of able and skillfull physicians who did see the samen, sua that if the forsaid wound was the cause of the Defunct's death, he was either killed casually or in self defence, or at least *ex malo regimine* in not using and applying suitable and speedy cures to the forsaid wound in due time. And farder to evidence the Defender's innocence in the said matter, two or three days before the Defunct's decease he sent for the Defender, most earnestly desiring to speak with him, and upon his coming, did not only freely forgive him but declared that there had never been malice betwixt them, as the said Exculpation bears.

Answers Sir Andrew Birnie for the pursuer, that the Defence as it is qualified in the Exculpation, cannot be regarded. The pursuer's procurators does no ways contravert the relevancy of the Defence as its founded either upon casuall homicide or slaughter in defence, which albeit they liberate the pannell from capitall punishment, yet the laws and acts of parl. whereupon these Exculpations are founded, doe leave the pannell in the hand of the justice for *pecuniæ mulctæ et pœna ordinaria.* The pursuer insists for simple slaughter and

alledges that the said homicide could be no ways casuall; for that is allenarly casuall homicide where the effect is not nor cannot be forseen by the party who gives the cause to the homicide, as in shooting in woods and butts and infinite such cases, but where the homicide depends immediatly upon an act or deed of the manslayer who designedly intend that dammage to the party slain, there can be no shadow for this pretence, for albeit the pannell did not intend to murder the Defunct or bereave him of his life, yet his intention cannot clear him of the slaughter seeing *in artibus illicitis* the effects and results are not ruled by the parties intention, nor does the law regard what arms are used or whether it be by precipitation or violent throwing to the ground, both the which may be occasion of Death.

2° Whereas the pannell pretends that albeit he were guilty of the wounds, yet the samen were not mortall nor lethall, the samen ought to be repelled, first in respect of the quality of the wound being large and deep and about the temple and vain organ, and that the Defunct being of a robust and strong body, was forced immediatly to take bed and did never thereafter arise, and notwithstanding that skilfull Chirurgeons were made use of, yet he languished *de malo in pejus* daily untill the day of his death. And for that part of the exculpation founded on self defence, if the pannell's procurators will make it relevant that the Defunct offered violence by arms antecedent to the wound lybelled, the pursuer shall not question the relevancy but remitts the same to the probation, but in sua far as its alledged that the Defunct did lay his hand on the pannell's band and did ryve the same, that could be no ground of self defence to take away the Defunct's life, seeing self defence is founded upon law whereby a private person injured and assaulted is constitute magistrate for the time and therefore may, for the preserving of his own life, do that office of a magistrate to take the life of another, and so must be *constitus in periculo vitæ sua* before he hazard to take another's, and whither the qualification state the pannell in such a hazard, is referred to the Lords of Justitiary their consideration.

Duplys Charters for the pannell that he takes Instruments

upon the pursuer's procurators their not contraverting the relevancy of the Defence so as to liberate from capitall punishment and restricting the same to simple slaughter. And whereas they declare that notwithstanding whereof the pannel cannot be exeemed from extraordinar punishment, the same has no place *hoc loco* but must be considered after probation led and done by advice of the Council conform to the acts founded upon. And whereas they insist upon Manslaughter, its answered that there was no deeds done by the pannell that are sufficient to inferr either Manslaughter or beating and wounding, its offered to be proven that the pannell was first provocked and injured. 2° Any deed done by the pannel being but done by him in repulsing of violence, and so being an act of self defence, whatever did accidentally follow thereupon *præter intentionem agentis* cannot fix any crime against him. And whereas its contended that it cannot be accounted an act of self defence unless it were alledged that the pannell had been assaulted by the Defunct in arms and had been *constitutus in periculo vitæ*, its answer'd that the alledgeance is unwarrantable, it being in the Judgement of almost all lawyers, lawfull to kill even in defence of their goods, much more in repelling of violence from their body, but in this case the Defence was commensurate to the violence and offence offered, in sua far as the pannell having been thrown down by the Defunct and others, after he gott up again the Defunct still persisting in doing violence to him by tearing his hair and taking him violently by the collar, he did only thrust him off, which being only an act that had no direct tendency to what ensued, and by all law an act lawfull wherein *dabat operam rei licitæ* whatever though thro' unhappy accident did follow thereupon, can never be impute to the pannell, but rather to the Defunct himself, who was so drunk as he was unable to withstand any moderate thrust. And whereas its contended that the qualities of the wound were such as must make him guilty of Manslaughter, its answered the Report of the Chirurgeons is opponed, whose Declaration being *in materia artis* must make full faith, which Declaration bearing that the wound was not *simpliciter* lethall, it must necessarily be inferred that it was not of the wound he died,

but *ex malo regimine* especially considering that its offered to be proven that the Defunct after the getting thereof, continued in the streets two or three hours in a cold, frosty night.

Triplys Sir David Falconer, that altho the Defence upon Casuall homicide and homicide in defence, are relevant in generall, being founded upon the Act of parl., yet as its lybelled in the Exculpation, it ought to be repelled, for it cannot be called Casuall homicide in regard *culpa casui precessit*, and its offered to be proven that the pannell *causam rixæ dedit*, having druken with the Defunct, who was newly risen out of a fever, untill the Defunct was overtaken and had given him provocation by calling him knave, rascall, beggar, slave, and the like. And its evident by his posture and actings after the wound lybelled was inflicted, that he intended to take away the Defunct's life, he being advertised by those who were present that the Defunct had gotten the wound lybelled, he pursued him farder and bruised his body, being thrown to the ground, and if these present had not taken him off, he had at that time extinguished the pannell's life.

Likeas he was heard express thir words or the like, that he knew the punishment and he would have penny worths of the Defunct's body therefore. And whereas its pretended that the wounds were not mortall, and that death did not ensue upon them, but *ex malo regimine*, its answered, that the pursuer has no necessity to alledge that the wounds were simply mortall, but its sufficient that death followed upon them, he having taken his bed, and altho he had eight or ten days, yet he did never eat or drink anything except some litle liquor, his jaws being holden up by a knife, and a wound may be mortall and occasion the death of a weak, tender, sickly man as the Defunct was, and yet may be cured in a robust, vigorous person, and there was no means neglected, the wound having been inflicted betwixt seven and eight a clock at night. There were Chirurgeons brought to him about nine a clock, and the delay was occasioned by the pannell's fault, in sua far as he being seized upon and carried to prison by the Constable likeways suggested him and got the Defunct to the Tolbooth,and he being once

in the Tolbooth, his relict could not get him out without Caution and a Warrand from a Baillie.

2° Self Defence is only sustained *ubi tutela est moderata* and does not exceed, but so it is the pannell was not *in periculo vitæ constitutus*, as said is nor in any hazard, the Defunct having no weapons nor other instruments to defend him, and the pannell might have freed himself from any hazard from the Defunct, either by calling on the persons who were present to remove him, or being an infirm, weak, sickly person, he might have holden him and laid him to the ground without any thrust or violence, whereas the thrust lybelled, being with force and in a place where Chests, Bunkers or boards were, necessarily occasioned the wound, and the wound the death of the Defunct.

Quadruplys Mr. David Thoirs that the reasons of Exculpation and Answers stands relevant notwithstanding of the lybell and Reply, because 1° It cannot be pretended that there was *culpa precedens* in the pannell seeing he did quite and flee the defunct's company and was followed and sought for by him in severall houses untill at last he was found in the house lybelled. Neither is the qualification that *causam dedit rixæ* sufficient either *per se* to inferr a crime or to make that which is clearly casuall being neither intended nor expected to be repute deliberate and resolved, and that this was a clear casuall thing is clear because 1° The pannell neither did nor could know that there were any sharp stool or bunker behind the Defunct, or that his head or any part of him would have lighted thereupon, or that the lighting thereupon should have occasioned an wound of the nature lybelled.

As to the quality of the wound the former Answer and Report of the Chirurgeons is opponed. And whereas its replyed that there is no necessity to prove that the wound was *ex sua natura* mortall, and 2° albeit it might have been cured in another, yet it was mortall in the Defunct, the same ought to be repelled because the lybell is no ways relevant without that seeing wounding *et mors secuta* are not relevant unless it likeways be alledged that *ex vulnere secuta est*, and seeing death cannot ensue upon a wound that is not of its own nature mortall, the death must be ascrived to the other

extrinsick accidents and causes, and not to the wound, and the Report is opponed concerning his individuall wound, whereas its replyed that the Defunct had not arms and was not *in periculo*, the exculpation and Answer is opponed bearing that the Defunct did invade the pannell *et primum fecit insultum*, neither had the pannell any arms, and the repulse was *omni modo* proportionate if not far under the quality and degree of the Invasion, neither was the pannell obliged to presume that he was able to hold the Defunct but *optimo jure* might thrust from him any person that either did or offered to invade him.

Interloqr. The Lords Commissioners of Justitiary having considered the lybell and whole debate ffinds the lybell as it is lybelled relevant only to inferr *pœnam extraordinariam* and remitts the same to the knowledge of an assise, and also remitts the Defences proponed for the pannel, viz. that of casuall homicide self defence, and that the wound was not of it self mortall, likeways to the knowledge of an assise.

Probation. The Advocate for probation adduces some witnesses and the Testificate under the hand of the Chirurgeon, which is booked verbatim.

Verdict of the Assise. The Assise all in one voice except one ffand that what was committed by the pannell was in self defence. The Justices continued the said Action till the 29 July and remitted the pannell to prison till they should take advice from the Privy Council.

Nothing more in this Diet but the Continuations of some Actions to the next Dyet.

Steuart agt. Hamilton for Forgery. James Steuart of Torrens, Thomas Crauford of Carseburn and others against Major Alexander Hamilton of ffoirhouse and others, indited and accused for fforgery in sua far as the said Major Hamilton and James ffreeland and Alexander Dunbar, writers in Edinbr. did forge a false Band of Cautionry of Suspension alledged granted by Robert King as Cautioner for the said Major.

None of the pursuers compearing to insist the Lords deserts the Diet.

Somervell agt. Robb for Adultery. *Eod. die.* Archibald Robb, maltman in Glasgow, indited

and accused at the instance of his Majesty's Advocate and James Somerveill, usher in Exchequer, for adultery committed by the said Archibald with Janet Wright, indweller in Glasgow, deserted, *vide* 15 June 1674 where the said Archibald is declared fugitive.

Row agt. Bell, Balfour, and John Maxwell for fforgery, continued.

Edinbr. 15 July 1674.

Steuart agt. Hamilton @mentioned, deserted,

Eod. die. His Majesty's advocate agt. Robb *ut supra* deserted.

There is no more in this Diet but some Continuations of things before continued.

John Maxwell, writer in Edinbr. indited at the instance of the King's Advocate for fforgery, committed by him in contriving, making use of a false and counterfeitt Band of Cautionry of Suspension, and for forging Archibald Row of Overinverallen his hand write and subscription to the samen for his not compearance, is declared fugitive.

Edinbr. 20 July 1674.

Act anent citing of Assisers.

The said day the Lords ordained the Macers of Court in all time coming when they summoned any assise to exhibite to ilk assiser the sub^{tt} Roll wherein the assisers name is, otherways they shall not be holden to answer at the Diet nor unlawed for absence.

Lodowick Gordon at the mill of Logie against the Laird of Drum and others for oppression continued.

Prōr fiscal of Kirkcudbright against Rannie in Slaggs of Skirburn, continued. The proces is for Theft.

His Majesty's Advocate agt. Robertson, Russel, Haitley and E. of Erroll's soldiers, and Andrew Ross, prisoners, continued.

John ffraser, writer in Edinbr. for alledged Adultery, committed by him with Helen Guthrie his pretended spouse, ordained to be sett at liberty in respect of his Majesty's Remission therefore.

Jean Bonar, prisoner in the Tolbooth of Edinbr. incarcerate by the Laird of ffullarton and others, in respect none of the pursuers compeared to insist, is sett at liberty upon her petition given into the Lords.

Edinbr. 22d July 1674.

Nothing in this Diet but some Continuations of Diets formerly continued.

Procurator ffiscall of Kirkcudbright agt. Rayne for Theft, remitted back to the Stewart of Kirkcudbright.

Edinbr. 27 July 1674, all the five Commissioners of Justitiary present, Craigie preses.

Maxwell agt. the Baillies of Paisley for wrongous imprisonment.

The whilk day Alexander Hume, sherriff depute of Renfrew, William Gennles and John Park, Baillies of Paisley, are indited and accused at the instance of John Maxwell, merchant in Paisley for the crimes of wrongous imprisonment committed by them, in sua far as the said John Maxwell, being about his lawfull affairs, they most unjustly and maliciously imprisoned him upon the 7 day of Aprile last by past or one or other of the days of the said month, for his alledged wounding of William Denniestoun of Cowgraine, who invaded and pursued him for his life, tho the saids Magistrates knew his innocence and that he was ready and willing to undergo a Triall for any crime they could pretend or lay to his charge, or to have found caution for that effect, and their malice, injustice and oppression is the more evident that they suffered the said William Denniestoun to go to his ordinary quarter within the said burgh of paisley and to return to his own house at his pleasure, and that they detained the said John Maxwell, prisoner for the space of seven weeks and upon his petition given into them for a triall, they refused it as not being Judges competent, and detained the said John Maxwell still as prisoner, and the said John being maliciously pursued by the said W^{m} Denniestoun before the saids Lords, the saids Baillies did cite the said Complainer to appear before them and did fine him in 50£ scots, and condemned him to pay two merks nightly for the space of 7 weeks as the expence of a

guard to attend their prison tho the witnesses adduced by them did prove that the Complainer was assaulted and pursued by the said William, and the wounds he gave was in his own defence, and detained him fourteen nights after the sentence, and the said sherriff depute of Renfrew did hound out the said William Dennieston to kill, invade and pursue the said Complainer, and he had been undoubtedly killed if he had not defended himself. Of the whilk crimes of wrongous Imprisonment, assasination, outhounding, oppression and others @written, the forenamed persons and ilk an of them are actors art and part.

Sir Andrew Birnie for the pannells alledges that they could not pass to the knowledge of an assise for the crimes lybelled, because what the Magistrates did was very just and warrantable, seeing the pursuer had committed a heinous ryot within their Burgh, and wounded a gentleman to the great hazard of his life, having languished for a considerable time under the hands of physicians, and there being no hopes of the gentleman's recovery, it was the duty of the Magistrates to secure and detain the pursuer, especially considering that there was Letters direct against him bearing a command to the said Magistrates to detain and transport the said pursuer prisoner to their Tolbooths of Edinbr. to underly the law before his Majesty's Justices for the said crime.

Mr. David Thoirs for the pursuer replys, That the lybell stands relevant notwithstanding of the Defences, because as to the first the pannells are *in pessima fide* to pretend that they had the least power or warrand for incarcerating the pursuer as being Magistrates of Burghs, because by the 5 Act 2 Sess. of his Majesty's first parl. it is expresly declared that persons who offer in the least to exerce any power as Magistrates within Burgh are to be repute as usurpers of his Majesty's authority, unless they take the Declaration, and not only have the pannells exerced without taking the same, but being required thereto by one of the Commissioners of Excise by way of Instrument, they refused so to do, so that their judiciall compearance and pretending to be Magistrates, is another crime in it self.

2° Albeit they had taken the Declaration yet their detain-

ing the pursuer so long in prison in way and manner lybelled, was an high oppression, in respect they not only deferred to putt the pursuer to a triall, but after he was tried and fined, and either had payed his ffine, or at least offered to pay the same, and they had accepted security therefore, they did yet farder detain him. Neither does the pretence of the Criminall Letters direct against him import any thing because 1° after he had given security for his ffyne as said is, they detained him a considerable time by the intimation of the saids Letters. 2° The Letters did not impower them to detain him but only to transport him to Edinbr. and yet they detained him, and after their malice could reach no furder, did sett him at liberty upon the same Caution which before they had frequently refused.

Birnie duplys for the Defenders that the pretence in not taking the Declaration, is of no weight in respect the Act of parl. founded upon does only concern his Majesty's Burrows, which is always understood to be royall Burrows, of which the pannells' burgh is none. 2° This alledgeance does not concern the pursuer but is allenarly competent to the King's Majesty his Council and Advocate, and when the pannells are conveened upon that head they shall answer, and this pretence would evacuate all the private Acts of Jurisdiction within Burgh where the Magistrates *de facto* have not taken the Declaration, which were of dangerous consequence and would resolve into confusion. As for the second member of the Reply, it cannot be regarded in respect of the grounds founded upon, whereby its clear that the Magistrates did justly in imprisoning, detaining and ffyning the pursuer, he having upon fforethought fellony assaulted Cowgrainie, a gentleman who was lodged that night within their Town and Burgh, and having wounded him in the head and body, while the gentleman was upon his back, and the wounds being mortall of themselves as appears by a Declaration under the Chirurgeon's hands, the Magistrates were bound to search and seize upon the pursuer. And albeit they were judges of an single blood and might ffine therefore, and likewise had power to liberate upon payment of that ffyne, yet the crime lybelled being of a higher nature, importing fforethought fellony and assasina-

tion, the gentleman being wounded before ever he did draw, and having received two or three wounds after he was upon his back, the Magistrates were not *in potestate* to sett him at liberty, especially considering the representation of Cowgrain's ffriends, of his weakness and hazard of life. As also that the Lord of Royalty and his Baillie, within whose jurisdiction the bloody fact was committed, prest the detention. Likeas the Criminal Letters raised before the Lords of Justitiary, did appoint him to be detained and transported, and the Magistrates needed not transport till about the day contained in the Letters. And for the forethought fellony and that this pursuer was assaulter, it is evident by a Letter under his own hand since the committing of the said crime, wherein he justifys the said action as being concerned in honour, and endeavours only to extenuat in the multiplicity of the wounds which he says he did not intend, and for that part of the ffine which concerns the expences of the Guard, it was a friendship done to the pursuer, the Lord of the Regality having appointed him to be secured in irons in regard of the hazard the gentleman was in, and the pursuer his former practises in making his escape by breaking of the same prison, does sufficiently justify the Magistrates in this keeping a Guard.

Sir David Falconer for the pannells, adds that the Reply founded upon the Declaration is no ways relevant to the pursuer, especially seeing the Magistrates were in exercise of their office and he had acknowledged them to be Magistrates, in sua far as he had given in a petition to them without so much as mentioning any Declinator upon that ground, as appears by the Supplication, and as to the Instrument produced, the Commissioners of Excise had no power to require or cause them take the Declaration, their office being only to regulate the excise, but having no Jurisdiction over the Magistrates. 2° He was justly detained even after he had given surety for his ffyne because he was arrested at the instance of one Love, as appears by a double of the Letters, with an Execution produced, so that the Magistrates being charged by vertue of Letters of Caption they could not demitt him. As to the Baillie Depute, there being nothing lybelled against him but outhounding of Cowgrain, he cannot pass to the knowledge

of an Assize because the principal party, viz. Cowgraine is not called.

Mr. Laurence Charters for the pannells, farder adds, That the Lybell cannot be sustained as relevant notwithstanding of the Magistrates not taking the Declaration, in sua far as its offered to be proven that the pannells were required by the Baillie of the Regality to go along and assist him in apprehending the pursuer for the mortall wounds given to Cowgrain, and so albeit they had been private persons, they were bound to do what they did, and cannot upon that account be termed Criminalls.

Mr. David Thoirs for the pursuer, Triplys and oppones the Act of Parl. ordaining all persons intrusted under his Majesty and Magistrates of Burghs in generall, which is comprehensive both of Regality and Royallty, to take the Declaration under the Certification therein specified. 2° The pretence of Arrestment upon Caption cannot be respected, seeing no such Caption is produced. 3d The pannells cannot palliat their oppression and usurping of his Majesty's Authority by any pretended command of the Baillie Depute, because not only did they imprison and ffyne by vertue of their own authority, but the said Baillie Depute had no power to command them, not having taken the Declaration himself, and so was *in pari delicto*. 2° The Baillies oppression was manifest in imposing and exacting a fyne from the pursuer. 3° The Supplication given in to them as Magistrates is no excuse for the forsaid Crime, the pursuer being then as in the hands of broken men detained by persons who had no power to do it. 4° The pretended Letter subscribed by the pursuer was likeways extorted *vi et metu* and is not the pursuer's hand write. 5° The Testificate cannot be respected, being but lately elicite from a pretended Chirurgeon who is brother in law to the person alledged wounded, and the Minister's Declaration is not upon Soul and Conscience, and the pretence of assasination and wounding Cowgraine upon his back is simply denied as a meer calumny and the pursuer was ready to have undergone a Triall therefore but Cowgraine being conscious that what the pursuer did was in his own defence, refused to insist, whereupon the Diet was deserted.

Mr. Laurence Charters for the pannells, Quadruplys 1° That they having been chosen Magistrates albeit they did not take the Declaration, neither the Council nor last Magistrates having required them to do so, what they did in the Magistracy is good and valid and the Law *Barbarius Philippus* is opponed, leg. 2ª ff. *de officio prætorum* is opponed whereby all Lawyers determine that what is done by a Magistrate otherways *inhabile* yet subsists and is good in it self. 2° If they had refused their Declaration their office fell *jure devoluto* in the hands of the Baillie of the Regality who is concurring all alongst and by whose direction they imprisoned the pursuer. 3° The pursuer himself acknowledged them as Magistrates by petitions given in to them, owning them as such before the committing of the crime.

The Lords Commissioners of Justitiary with consent of both parties deserts this dyet and ordains the Bands of Cautionry granted by John Anderson, Gavin Cochran and William ffyfe for the pannells, to be delivered up to them. Interloqr.

Eod. die. Francis Bell, indyted and accused for the crimes of Theft and Robbery committed by him and William Harewood *alias* Wood, some time grieve to the Lady Drylaw and lately prisoner in the Tolbooth of Edinbr. as Thieves and Highway Robbers, in sua far as albeit by the Common Law and Laws of this Kingdom the crimes of Theft and Stealing and taking from any person against their will any things or goods belonging to them is a most heinous crime and punishable by the laws of this kingdom with the pain of death and confiscation of their moveables and specially when the same crime is committed upon the high ways (which ought to he secure to all his Majesty's leidges passing and travelling peaceably through the same under the protection of his Majesty and his laws) by way of Robbery and Rapine, Nevertheless its of verity that the saids ffrancis Bell and William Harewood *alias* Wood shaking off all fear of God upon the day of June last, they having been in company together and being acquainted with others for a long time, and having drunken some time together in an ale cellar keept by Margaret Ross, untill it was about nine a clock at night, they went out Francis Bell indited for Theft.

of Town together about that time straight towards Graycruick, and having at the park of Graycruick mett with a young man whom they did not know, and finding that he had a good brown coat and breeches, and a black hatt, they sett upon him in a violent manner and did robb him and tear and strip him and robb'd from him the saids cloaths with a back'd sword with some money that was in his pocket, which robbery and villany was committed by them upon the said young man as he was travelling peaceably in the highway about ten a clock at night. After which time they went to the said William Hariewood's house at Drylaw upon the said night being Wednesday, and after they had been there all that night and next day they did again upon ffriday thereafter go in company together to Cramond, and after they had drunken all that day in diverse houses at Cramond untill ten a Clock at night, having stayed and waited till that time as most convenient for such villanous practises, they in the Highway towards Leith, finding Thomas Broun, Baillie of Inverkeithing all alone and afoot as he was travelling in the said high way, the said ffrancis Bell did most violently and wickedly lay his hand upon the said Thomas his breast and robbed and took from him all his money, being 40 merks less or more, and the said William Hariewood was by with a rung in his hand of purpose to fright or fell the said Thomas Broun if he should make any resistance. And after they had robbed him they went to a brae side and divided the money betwixt them and went together to the said William Hariewood his house at Drylae, and upon Tuesday thereafter they were taken in the Caldtoun in the house of ffrancis Harywood *alias* Wood, brother to the said William in the ffang and with the cloaths and money they had taken and robbed in manner @written, and when they were taken, the said ffrancis Bell denyed his name and called himself Steuart. Likeas when they were taken a false key for pikeing and opening locks and doors was found and taken out of the said ffrancis Bell's pocket. Which deeds and reiterate acts of Robbery are declared and confessed by them under their hands, having given Warrand to the nottars to subscrive for them before witnesses in presence of four Lords of Justitiary, as appears by their confessions containing the premises and circumstances

forsaid. By all which it is evident that they are guilty of the saids Robberys, and that they did combine together to rob and steal in the Highways, and therefore ought and should be exemplarly punished to the terror of others.

The Lords ffinds the Dittay relevant and remitts the same to the Assise.

The Assyse lawfully sworn no objection.

His Majesty's Advocate for probation adduced the pannell's own Confession, viz. ffrancis Bell, solemnly adhered unto in presence of four Lords by the said ffrancis who declared he could not write, but there is two Nottars subscriving for him[1]

The Lords ordained the Assyse to inclose and return their Verdict to morrow at twelve a'clock.

The Assise upon the 29th July instant gives in their Verdict ffinding (in one voice) the said ffrancis Bell guilty of the crime of Robbery.

The Lords continued the pronouncing of Doom agt. the said ffrancis till Monday next, and upon the 6 Nov^{r} 1674 the Lords Commissioners of Justitiary ordained the said ffrancis Bell to be hanged at the Grassmercat upon the 7th Nov^{r} instant.

Edinbr. 26 July 1674, William Harywood the other pannell is declared fugitive for making his escape furth of the Tolbooth of Edinbr.

Eod. die. John M^{c}Lean of Kenlochalin, George Ross, writer in Edinbr. and Mr. John ffraser, servitor to Sir Allan M^{c}Lean of Deuart, are unlawed for not reporting the Criminall Letters at the instance of the said Sir Allan M^{c}Lean and others against John Campbell, procurator of Arch. hatton and severall others. M^{c}Lean etc. unlawed for not reporting.

John ffain, prisoner, is sett at liberty furth of the Tolbooth of Edinbr. upon his being enacted to appear before the saids Lords when cited.

Eod. die. Sir Alexander Irving of Drum, Robert Lesly his servant, Alexander George, Robert Abercromby, Andrew Syme; messengers, James Ross at the Miln of Tartland, George Gordon agt. the Ld. of Drum etc. for oppression.

[1] 'He adhered to it before the Assise,' marginal note.

Durdward there, Alexander Irving in Tilliechermatt, John Ross in Strathmore, George Massie in Auchterfoull, Alexander Lecture in Tuley, James Ross there, William Davidson in Ruthven, William Mason in Cudago, James Hunter in Knowhead of Bastoun, Alexander Mason there, John Alaster and George Menzies there, Patrick Smith in Bounty, indyted and accused at the instance of Lodowick Gordon at the walkmiln of Logie for Stouthrief and oppression lybelled agt. them deserted.

Row agt. Bell and Balfours for fforgery.

Archibald Row of Inverallan against Gilbert Bell, maltman in Lithgow, Thomas Balfour in Wharnestoun and James Balfour his son, for fforgery, continued till the second of November next.

Edinbr. 28 July 1674.

There is nothing in this Diet but a petition for witnesses expences given in by the Sherriff Depute of Renfrew and Baillies of Paisley in the Action pursued by John Maxwell, merchant in Paisley against them.

Edinbr. 29 July 1674.

Petition given in by Helen Guthry, lawfull daughter to umqll. Major Andrew Guthry, indweller in Edinbr. and Agnes Lauder her mother, craving that Margaret Haitley, prisoner in the Tolbooth of Edinbr. might find caution for not troubling and molesting them. The Lords ordained the provost and Baillies of Edinbr. and keeper of the Tolbooth to keep and detain the said Margaret Haitley in the Tolbooth untill she find Caution of Lawburrows that she shall keep each of the petitioners skaithless in their bodys goods and gear.

Petition Jean Threapland, spouse to Daniel Carmichall, craving that she may have Criminall Letters direct at her instance against Jean Auld spouse to James Arbucles, merchant in Edinbr. and Archibald Baillie, their prentice, for the murder and slaughter of her son. The Lords grants the samen, the said Jean Threapland finding Caution for reporting and insisting, and that in respect that when they discharged

Letters formerly to be given out, it was upon a misrepresentation.

The same day the Lords Commissioners of Justitiary having advised with the privy council anent the punishment to be inflicted upon William Mason, prisoner, for the slaughter of umqll. James Ralstoun, committed by him in his own defence, they therefore with advice of the saids Lords of privy Council ordain the said William Mason to pay in ffyne the sum of 247 lb to the relict and children of the defunct, whereof £47 to be payed before his liberation and the rest at the three next terms by equall portions, and to find Caution for that effect before he go out of prison. As also the Lords ordains the relict upon payment and security of the saids sumes to grant a sufficient Discharge of the samen in satisfaction of all she and the Children of the Defunct can ask or claim upon the accompt of the alledged slaughter of her husband.

The same day the said William Mason and James Ralstoun, barber in the Canongate, gives their oaths that they dreaded of their bodily harm and finds Caution of Lawburrows enacted in the books of adjournall to others.

Edinbr. 3d August 1674 and Novr 2 the same year.

The said 3 August Margaret Haitley, prisoner in the Tolbooth of Edinburgh, finds Caution of Lawburrows to Helen Guthry and Agnes Lundie her mother.

The pronouncing of the Doom against ffrancis Bell, prisoner, continued till the second day and from that till the next day.

Edinbr. 6 Novembr. 1674.

The said day ffrancis Bell, prisoner, who was found guilty of Theft upon the 29 July last is sentenced to be hanged.

Edinbr. 9, 10, and 12 Novembr. 1674.

The said 9 day, Andrew Rutherfoord of Townhead, Baillie of Jedburgh, prisoner in the Tolbooth of Edinbr. is indited

and accused for the slaughter of James Douglas, brother german to Sir William Douglas of Cavers, having been in company with him upon the 9 July last at the house of Andrew Haswell in Swineside, where they and diverse other gentlemen dined, and coming from thence to the Town of Jedburgh, the said Andrew upon the way within a mile to the town, by giving him a mortall wound with a sword through his arm and body under the pape, whereof he died within four hours. And the pannell being conscious to his guilt did retire and flee to Newcastle in England, and from thence to the South Shield to have imbark'd there for Holland, which he could have done if he had not been apprehended, of which Murder he is guilty, actor art and part.

The pursuers are the said Sir William Douglas of Cavers and Christian Douglas, the relict of the Defunct for her self and in name of his children and friends, Sir John Nisbet his Majesty's advocate, Sir David ffalconer and Mr David Thoirs, advocates, and for the Defender Sir Andrew and Mr. Alex. Birnies.

Sir Andrew Birnie for the pannell founds his defence upon the exculpation and always denying the lybell, he insists *primo loco.*

APPENDIX

Edinbr. 7th, 9th, and 10th days of January 1678. The Courts of Justitiary holden by Sir Archibald Primrose[1] of Carringtoun, Justice Generall. The Lords Collington, Strathurd, Castlehill, Forret[2] and Glendoig, Commissioners.

Dittay against Mr. Jas. Mitchell for assasinating the Archbp. of St. Andrews, a privy Counsellor.

Intran Mr. James Mitchell, prisoner,[3] indited and accused Forasmuchas by the Common Law and Law of Nations and Law of this Kingdom, murder and the assaulting and attempting upon any person or persons by way of forethought fellony *et per insidias et industriam* of purpose and design to kill, are most atrocious and detestable crimes, destructive to and against the being of Human Society and is severely punishable, but especially when the samen are committed upon the persons of Counsellors and other officers who do represent authority and are liable to the mistakes and malice of wicked persons for doing their duty, or when the samen are committed upon the persons of Churchmen, Bishops or Ministers. who are of the sacred function, who are by the laws of all nations priviledged and secured alse much as can be against the malice and sacrilegious attempts of wicked persons. And particularly it is statute by the 4 Act par. 16 K. Jam. 6, That whatsoever person

[1] Sir Archibald Primrose of Carrington was one of the most celebrated and honoured Scottish statesmen and judges during the reign of Charles II. He was appointed by Charles I. Clerk to the Privy Council in 1641, and at the Restoration appointed by Charles II. Lord Register of Scotland. In 1661 he became a Lord of Session, with the title of Lord Carrington, and in 1676 the King appointed him Lord Justice General. He died in 1679, his son Archibald becoming the first Viscount of Rosebery in 1700, and Earl of Rosebery in 1703.—W.

[2] Sir David Balfour of Forret, admitted advocate 29 January 1650, raised to the bench June 1674, and appointed Lord of Justiciary July 1675.—*Brunton and Haig.*

[3] The interval between the proceedings in 1674, already reported, and his final trial was spent by Mitchell in prison, first in Edinburgh, and latterly in the Bass. In 1676 he was tortured before the Council in order to extort a confession as to his share in the Pentland Rising. In this indictment the charge relating to that matter is omitted.

invades or pursues any of the Lords of Session, Secret Council, or any of his Majesty's officers for doing of his Majesty's services shall be punished with death. And by the 7th Act parl. 1 of his Majesty's Royall Father *in anno* 1633 intituled, Act anent the invading of ministers, it is statute that the same shall be extended to all Archbishops, Bishops, and Ministers whatsomever. And by the 4 Act of his Majesty's second parl. and second session of the same, its statute that whatsoever persons shall be guilty of the assaulting the lives of Ministers, that they shall be punished with the pain of Death and Confiscation of their moveables. And by the laws and acts of parl. of this kingdom, the mutilation and dismembration of any of his Majesty's subjects, by way of forethought fellony is an high and capitall crime and punishable with the pain of Death. Nevertheless it is of verity that ye having shaken off all fear of God and Conscience, respect and regard to his Majesty's authority and laws, and conceiving a deadly hatred and malice against a Reverend Father in God, James, Archbishop of St. Andrews, a person who had never known nor seen you so as to take nottice of you, and much less had given you any offence, without any ground or quarrell and upon account only that he was advanced and promoted to be Archbishop and to be of his Majesty's privy Council and did serve God and his Majesty faithfully in the saids stations and offices, you did daily contrive, resolve and design the murder and assasination of the said Archbishop, and in order thereto, having provided your self with a pair of long Scots iron pistolls, near muskett bore, you did upon the 9th of July 1668, or one or other of the days of the said month, proceed and take the opportunity to execute and go about your cruel and horrid design when the said Archbishop in the afternoon of the said day, did come down his own stair and was going to his coach, being to go abroad upon his occasion with a Reverend ffather in God, Andrew, Bishop of Orkney, and you having a charged pistoll with pouder and ball did most cruelly and felloniously assault the saids Bishops, and did ffire, discharge and shoot the said pistoll upon them being within the said coach, and God of his goodness having preserved the Archbishop whom you intended to murder, you did by the said shott grievously wound the Bishop of Orkney, to the great hazard and danger of his life. So that having for a long time and with great pain, torture and expences of blood, languished of the said wound, being in a most dangerous place in the joyning of the hand and arm, where there is a confluence of

nerves and ffibres, he did never recover his health to that measure and vigour that he had or might have had if he had not gotten the said wound, and he was mutilate and dismembred as to his arm and hand so that he could make no use of the samen but languished thereof untill he died. And after you had attempted and committed the said villany and assasination *tanquam insidiator et per industriam* and by way of forethought fellony, you did go away and escap'd through the multitude and throng that had gathered upon the noise of the said shott, having another charged and bended pistoll in your hands of purpose and design to have killed any person who should have offered to take and apprehend you. The forsaid attempt and villany being without any parrallel, the circumstances of the same being considered, viz. that it was committed by one who profess'd to be of the Reformed Religion and who did pretend to be and serve as a Chaplain in severall familys. That it was committed upon persons of the sacred function and ffathers of the Church, and that it was committed to the great scandall and disadvantage of Christian Religion, and especially of the protestant reformed religion, the professors and preachers of the same having so much declared against and by their preaching and writting having exprest their detestation of such attempts and practises, committed by persons and owned by writers of the Roman profession, and that it cannot be instanced that any of the protestant religion was guilty of any attempt upon the account of Religion, and that the worst of men being ashamed to committ such villanys for covering the same, and for their security, doth take the opportunity of Darkness and Solitude, in corners and solitary places, your malice was so implacable that you was prodigall of your own life to be master of the life of the said Archbishop, and in the High Street of Edinbnrgh and in the day light, and in the face of the sun, and before many witnesses, near or at a litle distance from the said coatch, where you could not but expect to be presently seized upon, you did devote your self and adventure to committ the said most villainous and wicked attempt, yet notwithstanding of all the saids aggravations and circumstances of horror and remorse, you did continue in your implacable malice and did converse and keep company with Robert Cannon of Mondrogat, and with Welsh of Cornlie, and M^cClelland of Barscob, declared and excepted Rebells and Traitors, had diverse meetings with them, and upon discourse concerning the said attempt, every one of the persons putting it

Triall of Mr. Jas Mtichell.

upon one another, when it was put to you, you said and uttered these or the like speeches 'shame fall the miss' and that you should make 'the ffire hotter.' And after the time and attempt forsaid in the year 1668 and subsequent months, years and days of the saids respective years, and in one or other of them, your guilty conscience disquieting and pursuing you, you did robb and go abroad severall times to Holland, England and Ireland, untill Divine Justice did drive and bring you back to this kingdom that Justice might be satisfyed and vindicate in some measure where you had committed so great villanies. After your return you did proceed to that height of boldness and confidence, or rather impudence, that you did repair to and live in Edinbr. and was married there with your wife, who is yet living, by Mr. John Welsh, who is a declared and excepted Traitor and forefault for his accession to the Rebellion 1666. And your boldness was so great in outdaring both God and authority, that for a long time you have been lodged and has keept a shop near that place where the Archbishop doth and is in use to lodge when he is in Edinbr. till at length ye was discovered and apprehended, having upon you the same pistol which ye shott when ye committed the said attempt, which was found under your coat, charged with powder and three ball, of purpose to attempt again and execute your bloody design against the said Archbishop, at least against any person who should offer to take you. From all which premises its evident that ye are guilty of the saids atrocious crimes of Murder and assasination by way of fforethought fellony and is a percussor and siccarius, and of mutilation and of the other crimes above mentioned, and therefore the saids pains ought to be inflicted upon you as a murderer and assasinate, and as guilty of the crimes forsaid, in an exemplary manner, to the terror of others.

His Majesty's Advocate produced a warrand from his Majesty's Privy Council for pursuing the said Mr. James Mitchell, whereof the Tenor follows.

Edinbr. 6 December 1677. The Lords of his Majesty's privy Council do hereby grant order and Warrand to Sir George M°kenzie of Rosehaugh, his Majesty's advocate, to raise and pursue a criminal proces before the Lords Commissioners of Justitiary against the said Mr. James Mitchell for the assasination attempted by him upon the Archbishop of St. Andrews and the Bishop of Orkney.

Extracted by me *sic subr.* Al. Gibson.

Mr. John Eleis, advocate for the pannell, produced an Act of his Majesty's Privy Council impowering Sir George Lockhart and him to appear for the pannell's Defence, whereof the Tenor follows.

Edinbr. 3d of January 1678. The Lords of his Majesty's Privy Council having considered a petition presented in behalf of Mr. James Mitchell, prisoner, representing that he is upon Monday next to undergo a Triall before the Justices at the instance of his Majesty's advocate as the alledged person that shott a pistoll at the Archbishop of St. Andrews, yet no advocate will undertake to compear for him without they be specially commanded so to do, and therefore supplicating that Sir George Lockhart and Mr. John Eleis, advocates, may be ordered to that effect. The saids Lords doe hereby recommend and order the said Sir George Lockhart and Mr. John Eleis to appear and plead for the supplicant before the Justices in the Cause abovementioned upon Monday next and other Diets of that proces, and appoints intimation to be made hereof to the said Sir George Lockhart and Mr. John Eleis, and the petitioner. Extracted by me *sic subr.* Al. Gibson.

His Majesty's advocate declares he passes from my Lord Justice Generall as a witness in this Cause.

Mr. John Eleis, advocate, as procurator for the pannell, declares that they sustain my Lord Justice Generall to be a Judge in this Cause, notwithstanding he be cited as a witness both by pursuer and defender.

Mr. James Mitchell, pannell, denies the Dittay, and any pretended Confession alledged emitted by him.

Mr. John Eleis for the pannel alledges that he cannot pass to the knowledge of an Assise, and the conclusion that the pannell has committed Murder cannot be inferred from the subsumption of the lybell, because by the laws of this kingdom, the Civil Law, the common opinion of Doctors, the law and generall custom of all Nations *nudus conatus et affectus sine effectu*, even in the most attrocious crimes, except Treason, Parricide, and other excepted crimes, is not punishable by death, and it were against all reason, seeing punishments ought to be proportionate to the crimes, that a naked and simple design of Murder should be punished as Murder that had taken effect *et in criminibus gravioribus et gravissimis* viz. *adulterium, furtum, sodomie*, etc., the naked design is not punished *pœna ordinaria* even by the civil Law, and tho *Lex Cornelia de sicarijs* by an extraordinary streetch does declare *si quis cum telo ambulaverit,*

yet its but a statutory law and derogate to by the law of nations and the speciall laws of our nation, in sua far as murder in our law is designed to be and has only place in *Interfectis per felloniam*, and these who were killed upon forethought felony.

2° In sua far as the lybell concludes him guilty of assasination the same is no ways relevant it being both a term and a crime unknown in our Law, and by the laws and acts of parl. of this nation the subjects of Scotland are to be governed by the Laws of Scotland, and though crime of assasination were a point of Dittay by our law as it is not, yet it is not nor cannot be pretended he was hired for that effect nor is it lybelled. In sua far as the lybell concludes the pain of death for mutilation of the Bishop of Orkney, its answered, that the same is no ways relevant and the said conclusion cannot be inferred from the subsumption, because the act of parl. does only declared Demembration to be punished as Slaughter. 2° The said Act declares Demembration to be only punished as slaughter when it proceeds upon forethought fellony. 3° The said Act requires another qualification, viz. that it be pursued by the party, none of which can be subsumed upon in this case because its not lybelled that the Bishop was dismembred or had his hand cutt off, but only had a wound in his hand, and the lybell does expresly bear that the Bishop of Orkney gott the shott accidentally in the hand when the design was against the Bishop of St. Andrews, and so was not upon forethought fellony as to him. And lastly the Bishops nearest of kin does not concurr nor pursue, which is a speciall requisite in the said Act of Parl. Likeas the said Act is exolet and in no Register can it be made appear that any person was capitally punished for dismembration, but upon the contrary, many accused and condemned in arbitrary punishments, so that the lybell is no ways relevant as to that article for the reasons forsaid, specially seeing dismembration is not so much here as lybelled or pretended. And whereas its insinuate that the Bishop did languish and dye of the said wound, its answered, that the Lybell is no ways relevantly conceived, because its not lybelled that the wound was *ex sua natura* lethall or mortall, and its offered to be proven that the Bishop did live severall years thereafter and go about his ordinary function as a Bishop, by preaching, etc. which is a sufficient ground of exculpation and defence.

In sua far as the lybell is founded upon the Act of parl. anent invading of Counsellors, its answered that this present case does

not fall under the compass of the said Act of parl. because its not lybelled that the cause of the pretended invasion of the Archbishop was upon the account he was in the prosecution of his Majesty's service, but upon the contrary, it may appear strange to any rationall man *quorsum et cui bono* he could have done it.

As to the Act anent invading of ministers, they import no capitall punishment but only confiscation of moveables, and as to which the saids Acts are opponed, and as to the Act 1670, its posterior to the fact lybelled, in sua far as the lybell seems to be founded on a Confession, and in sua far as the Confession may be made use of as a sole or conjunct probation, the pannell does object against the samen upon the grounds and reasons following. 1° If any such Confession was emitted by the pannell, which he has absolutely denied in presence of the Lords (no ways acknowledging the lybell) no respect can be held thereto, and it is not probatory because the samen is extrajudicial *et extra Bancam*, in regard it is not made in presence of the Assise, who are Judges to the probation, which is expresly contrary to the 90 Act 11 par. Ja. 6, which requires the haill probation to be led in presence of the assise and party, and which act of parl. was not only made for security of pannells as to a just and legall procedure against them but also that the Assisors to whom the trust of the lives of the subjects of this kingdom is committed as to the point of probation might not proceed upon ffame and report, but upon a clear probation before them, for if that were not, the assise would be altogether deprived to know how the Confession was emitted if spontaneously or *ex constantia vel trepidatione* or *spe veniæ*, and the most that ever was sustained in this case was that the Assise did find a party guilty upon a Confession emitted before a *quorum* of the Justices in a fenced Court. *Esto* the said pretended Confession should be sustained probative as for the reasons above represented (the pannell with all submission to the Lords humbly conceives) it cannot, yet if any such Confession was, it is null because it was *elicite spe veniæ et immunitatis*, and for proveing thereof the pannell does repeat his exculpation which he conceives is relevant in law, and craves the witnesses therein to be examined upon the contents thereof. 2° The said Confession being emitted *extra judicium et spe veniæ*, as said is, *est in se nulla*, and cannot be confirmed nor validate by the testimonies of any witnesses whatsoever. And to evidence that the pannell's life was never intended to be taken upon the said pretended Confession, the same (if any

was) is opponed, by which it evidently appears that he was examined upon oath as to the most materiall part of the crime, viz. his Complices, which makes it more then evident, then it being *in materia criminale et capitale*, in which oaths cannot be taken by law, renders the Confession null and invalidate, at least makes it evident that the lybell has been restricted *ad civiles effectus*.

Triall of Mr. Jas. Mitchell.

My Lord Advocate insists in the first place upon the 4 Act parl. 16 Ja. 6. by which *nudus conatus* attempting and invading, tho nothing follow, is found relevant to inferr the pain of death, but so it is that the said Mr. James Mitchell did attempt the killing of the Archbishop of St. Andrews, a privy Counsellor, which attempt *devenit ad actum proximum* the said Mr. James having done all that was in his power. And as to the quality adjuted in the act insinuating the defence that it must be proven that it was for doing of his Majesty's service, its replyed that this quality is inferred and cannot nor requires not to be otherways proven then by a presumed inference, for the design of the attemptor being an act of the mind and the secret of the heart, it cannot be otherways proven but simply by the attempting a secret Counsellor or any of his Majesties officers against whom the pannell could have no quarrell but for doing of his duty. And therefore the Law still concludes the same except the pannell will offer to condescend upon another relevant reason, viz. any private feud, for if it were otherways, the act would be absolutely useless, since any person might attempt and kill a privy Counsellour, it being impossible to prove what was the design, and this act was designed meerly to make all attempts against privy Counsellours punishable by death for otherways it could be no sense nor protection for privy Counsellours if it were only granted to them under a quality, which were impossible to be proven nor can this seem hard since the subjects have only themselves to blame who attempt against the lives of privy Counsellours, and it were very ridiculous to think that if the brother of a pannell should attempt to kill the Judge or King's advocate immediatly after a proces that it were necessar to prove the design otherways then by the naturall contingency which obviously arises from the quality and circumstances of the perpetration. But in this case as Mr. James Mitchell is a person who can condescend upon no private offence betwixt the Archbishop and him, being absolute strangers to one another, so besides the presumption of Law @specified, its offered in fortification of the act, that *primo*, the said Mr. James owns himself

to be of a profession who hates and execrates that hierarchy and of which sect the unhallowed pen of Naphtali declares it lawful to kill these of that character. 2° Its nottar and offered to be proven that Mr. James himself defended that it was lawfull to kill such and endeavour'd by wrested places of scripture to defend himself and gain proselytes thereby, and if need were, as there is none, its specifickly and distinctly offered to be proven that he acknowledged that the reason why he shott at the Archbishop was because he thought him a persecutor of the nefarious and execrable Rebells who appeared on Pentland hills, nor can designs nor acts of the mind be otherways proven then by such emitted Declarations, arguments and acknowledgements. Likeas in the whole course of our Law, the invading or attempting any of that sacred function is still declared equivalent to killing, and tho' the last act be posterior, yet it is sufficient to demonstrate and clear, and 3° by the Common Law *conatus* and endeavour is *in criminibus atrocissimis*, punishable by death *ubi reus devenit ad actum proximum et omne quod in se erat fecit*, which is in it self most reasonable since the atrocity of the crime should put the same ever beyond an attempt. And there can be nothing more just then that the extraordariness of a crime should have an extraordinary allowance and guilt attempted in atrocious crimes such as sacrilegious assasination in the eye of the law as great and greater then the stealing a horse or cow, specially where security from the effect proceeded from no innocency of the committer who did all he could, but from the speciall providence of God disappointing the effect of a cause he so much hated, and Carpsovius requires only three qualifications to make endeavour punishable by death. 1° *Quod eventum erat ad actum morti proximum.* 2° *Quod nonstetit per assasinum quin consumaretur delictum.* 3° *Quod occidendus fortuito casu tantum evaserit.* All which but concurr too well here, and that in *omnibus criminibus atrocissimis conatus* is punishable, is clear from Gothofred: *tit de Conatu*, from Covarivius in Clementina, *Si furiosus* Num. 6. And particularly in the crime of assasination *totidem verbis*, by Mathœus *de sicarijs* Num. 3. *Assasinus*[1] *tamen nihil prodisse debet solusque conatus capite puniendus*, a great instance whereof is given in a decision by Gothofred in the senate of Savoy, where death was inflicted upon a person who but strake with a batton. And whereas its pretended that assasination is no crime

[1] '*Assasinis*' in MS.

in our law, and that its only inferred where the design of murdering proceeds from the Committers taking of money, its answered that this part of the Defence is most groundless, and our nation would be more barbarous then these of Lapland, or the Tartars, if the lying in wait with a constant design to kill clandestinely *et per insidias* any person who had never offended us, should not be raised to a higher of detestation then ordinary murder, for tho the law does not always punish a meer endeavour when designed against such as have offended us where nature pleads some excuse from the greatness of passion or resentment, or where the party killed gave some occasion by doing the wrong, or where the suddenness of the design allowed not time to consider or repent, yet where a person after mature deliberation ripens his own villany and resists the motions of reasons and inspirations of God almighty, by lying in wait to kill a person who never offended, the Law thinks the Commonwealth can never be secured as long as such a viper is alive, who wants nothing but opportunity to kill mankind one by one, and the speciality of taking of money is only demonstrative and not restrictive, since the guilt in this and sicklike cases is greater and more dangerous then that of taking money, for he who takes money will not kill but in darkness and where he may escape, but the sun and the Cross and the confluence of all the world cannot secure against murders where the party imagines that the crime deserves Heaven, or at least where he thinks that these of his perswasion will rise in a tumult upon the streets for his defence. Likeas since the Law has enforced death *ob conatum* in the crime of Raptus, Robbery, etc., much more it should inferr death in this unparallelled and execrable crime.

As to what is alledged against the acts of invading ministers, it is answered that the first act appoints that it shall be punished with all rigour, and the 7 act K. Cha. 1, and the last act is sufficient, tho posterior to the crime, to declare what was the meaning of that generall of punished with all rigour. And since our law makes the attempting of such as are doing his Majesty's service, capitall, that generall ought to be extended to death, since lesser crimes and other crimes are for the same reasons which are applicable to this punishable by death. Nor can there be any hazard in this, seeing there is a law for the future, and no man shall ever dye for so great a crime in our nation.

Whereas its alledged that here the pannel did only confess upon

hopes of life, its replyed that 1° The promise of life from a Judge who could not grant the same, cannot defend, especially where no threatning proceeded, and where it is clear that what was confest was founded on other presumptions *et indicia*, nor is this relevant except the pannel could offer to prove first, Threatning, to the fear whereof he yielded. 2° That he expresly pactioned that this Confession should not operate against him, which is very clear from Bossius tit. *de Confessis per torturam* num. 12, where he states the case and concludes that a spontaneous confession tho life were promised, does not defend, nor is the guilt nor truth less that a Judge promise, and if this were sufficient, every Judge might make himself King and grant remissions at his pleasure. And tho this might weigh with the Judge who promised, yet the law considers the party confessing still guilty, and so does never secure him *et quod potest condemnari tenent.*—Cinus *Codi de ijs qui ad ecclesiam effugiunt*, Alciat, *lege de verborum significatione*; and Clarus himself says, that *ego suspicor opinione in Cini esse majus communem*, but giving his own opinion rather as a private man then a lawyer, he says, *ego tamen non condemnarem ad mortem nisi alijs indicijs fuerit gravatus ergo reus indicijs gravatus est morte plectandus*, which is most just and reasonable, for tho the law be jealous where a meer silly innocent confesses to a judge who may terrify him, or have an interest in causing him confess to lay the blame off his friends, yet where the Confession proceeded from a person suspect by all the world; by a person who publickly in all places since has owned the deed; who fled upon that account; who was taken with unlawfull weapons, unfitt for his profession; and the specifick weapons which committed the attempt; who condescended upon all the circumstances and declared that he gloryed in being a Martyre upon that account; in being seen run away immediatly upon doing of the deed, with a pistoll in his hand; in being found out in a thousand lies and prevarications when he was examined; in having renewed his Confession publickly, it were but to scorn the Law, and massacre mankind, to think that a Confession so adminiculate should not bind the Confessor, who can alledge nothing of any threatning used against him by the Judge to whom he confessed, and lawyers do in that case consider the quality of the Judge as severe, rigid, unjust or partiall. But the Confession is alledged to be made here upon promise of life given by my Lord Chancellour, whose benign, gentle temper frees him

from all suspicion, and the proponing of exculpation acknowledges the deed to be committed by Mr. James Mitchell, the pannell, against which the protestation denying the lybell cannot be sustained being *contraria facto*, as is evident to any rationall man. And that the pannel cannot pretend either *alibi*, nor any other pretence of error for excusing his retractation, so his Majesty's advo: oppones this Confession bearing no qualification. And tho he is very secure that the exculpation cannot be proven, yet since its nottarly known that he is the committer, and that this may be a preparative to other pannells against whom no probation is ordinarly had, but Confessions elicite by Judges with fair and gentle promises, he *mordicus* adheres to the relevancy, for as Bossius says, *etsi judex dixerit, nihil mali eveniet tibi vel etiam promittat ut liberabitur majus tamen communis est opinio confessionem valere quia judex etiam poterat fingere ad veritatem eruendam.*[1] And as this is most advantagious to the Common Wealth and mankind, so there can be no hazard to a private pannell, since if he can but astrict his own innocency, or the reason of his error by alledging that he was *alibi*, or that there was severe threatnings or torture used, the same will still be allowed to qualify his Confession. But the generall presumption lyes that a Judge will not damn his own soul, stain his function, ruin his fame, expose himself to the terrors of God almighty, by alluring a Confession from a poor innocent.

As to what is objected against the Confession as extrajudiciall and before an incompetent Judge, its replyed, that Confessions are of all probations the most infallible, since witnesses may, but it cannot be presumed, that a man will wrong himself, and the rise of that maxim that extrajudiciall Confessions are not relevant, was only to exclude probation upon Confessions emitted, where there was no Judge nor design of enquiry, but the Confession being loose and inconsiderate and under no reason of advertance, did at random own a deed, of which they were most innocent, either for ostentation, or to please the company, or in raillery; but to say that a man should not be judged by what he deliberately confesses, where he knows the design is to enquire into the crime, and that the event must be a criminall triall, is without all foundation or probability of reason, nor can Judges or Assisers be so much convinced by

[1] '*inveniendam*' in Cobbett.

what witnesses will say, who may have malice, or be bribed, or mistaken, as what proceeds from a man's own breast deliberately and in cold blood, which in effect is oft times the inspiration and influence of God almighty, who to show his love to Justice and kindness to Mankind, draws even from the greatest of malefactors the clearest Confessions. And since men do not use to bring witnesses when they committ crimes, nor can the nature of the thing allow probation by writt, to cutt off Confessions in these cases, were to make crimes for ever pass unpunished, and to make law, which is founded upon principles of reason, and the good of the Common Wealth, evanish in meer terms of art and hard words, contrary to the design of Lawyers and the solid principles of sincere truth.

That this Confession is then Judiciall, is clear, being taken by authority of the Privy Council, the Supreme Judicatory of the Nation, and where the design was to expiscate this truth, and the pannell knew that he was upon a triall for his life, nor can the incompetency of that Judicatory be here alledged, since as the session is a Judicatory meerly Civil, so the Council is a Judicatory above both, and being so far competent in the cognition of crimes, that they take precognitions in criminall causes; they modify and qualify the sentences of the Criminall Court; they determine intricate cases remitted to them by the Justices, in point of law, and the king and the greatest part of the criminall court being there, it were absurd to think that a Confession emitted before them, should not prove. And if in a precognition a party should confess, and so the Triall there cease, what could be more absurd then to think that this Confession should not bind, especially seeing Confessions emitted before the Lords of Session in cases of Improbation and Decreets following thereupon, are a sole, finall and plenary probation before the Justice Court.

Likeas that principle in law that *Confessio coram judice incompetente*, does not hold, is where *judex est incompetens tam ad inquisitionem quam ad accusationem*, as in *forum penitentiæ*, such as kirk Sessions, or *forum mere civile*. Neither of which can be said in this case, where the Judge before whom the Confession was emitted is the ordinary Judge of Inquisition, and triall in criminall causes, *et Judex non solum jurisdictionis prerogabilis*, but a Judge who originally and generally examined all the pannells of Scotland. Likeas this Confession was made in presence of his

Majesties Privy Council and the king's Commissioner, in whom all the Judicatorys of the kingdom do eminently reside, and who might have sent the pannell to the scaffold without an assise, seeing *in confitentem nullæ sunt partes judicis.*

Whatever favour may be allowed to retractions of Confessions *facta ex incontinenti ubi potest docere de errore,* yet what reason can be where a pannell denies without showing proofs of his innocence. And therefore Bossius, tit *de confessis,* num. 64, concludes, *est etiam necessarium allegare errorem ceterum si simpliciter revocaverit confessus non est audiendus.* And num. 70, he adds, *quia fateor quod quis non auditur simpliciter, dicendo post confessionem, non est verum quod confessus fui, tamen si per testes constare potest de innocentia magis attenditur veritas quam confessio.* And since minors in law are obliged *docere de errore,* when they revoke, it were absurd to think that the Law would be so ridiculous that a man confessing before a grave Judicatory, should have liberty to retract without showing any reason of his retraction. And the guilt rather grows *per infitiationem,* and by that impudent lye, then is lessened by the retraction.

In the case likewise where Debates are concerning the validity of a Confession, lawyers consider whether what was confest, was or can be, adminiculate by other collaterall probation, *argumenta et indicia,* and whether the probation be *versimilis,* whereas here the Confession is adminiculate by many other circumstances, such as persons who saw him run away; by his owning of the principle since; by his flying etc. So that here neither can he instruct why he retracts, and the thing confest is *adminiculate et circumstantijis et indicijs.* As to the objection founded upon the Act of Parl. that the probation must be in presence of the Assise, its replyed, that the whole frame of that act is grossly mistaken, for the design of that act was to correct a barbarous custom whereby accusers were allowed to solist and to produce to them such writt and witnesses as they pleased for probation of the crime, to preclude the pannell of what he could say against the same, since false papers might be thrown in as Confessions and proofs, but that cannot reach in this case, where Confession is produced before a pannell and his procurators, and they heard to object against the same. Nor can it be urged from this Act that no paper can be relevant but what is owned by the pannell in presence of the Assise, for we daily see that Letters produced

under the pannell's hand, tho he should deny his subscription, will be sustained. And it will be sufficient to prove by witnesses that he did subscrive, or by comparison of Letters.

Likeas this Act of parl. does not exclude that Confessions before the Lords of Session in matters of falshood, and Decreets following thereupon, may not be probative before the Justices. Likeas Confessions taken before the Justices, tho no assise be present, do, without all controversy, and debate, prove the crime. Yet neither can the Justices condemn without an Assise, nor does that Act of Parl. militate more against that case then against this. And in the case of Finley McGibbon, a Confession taken in the Tolbooth without a fenced Court, and before one Judge, was fouud sufficient to inferr the pain of death, both before the Council and Justices. And its admired how it can be thought that presumptions can be sustained as the foundation of a Criminall Sentence, as wee daily see, and that witnesses which in effect are but presumptive, and a man's own Confession emitted seriously and in cold blood, should not be sufficient. And as there could be nothing more dangerous to the Common Wealth then that crimes should be rendred thus unsearchable, so what hazard can there be to the people on the other hand, or the pannell, when they are made their own Judges. And to take off all possibility of danger, it shall be allowed to them to prove error, force, innocence, or mistake. And this probation has been in all ages and nations sustained as uncontraverted, as David ordained the person who said he had killed Saul, immediatly to be execute without farder enquiry, giving as the undoubted reason, that he had condemned himself out of his own mouth, and which is registrate in Scripture to secure the Image of God against these who could deface it. And if such Confessions should be sustained in any case, much more in this, where the nature of the crime is atrocious, and the manner of the discovery extraordinarly difficult. And if either atrocity or difficulty prevails with Lawyers to remitt somewhat of its ordinary rigour, in exacting clear probation, as we see *in criminibus exceptis et criminibus domesticis*, much more where both these concurr, ought a mans own Confession to be admitted. And whereas ordinarly pannells are penitent first when examined, the horror of the crimes softning their hearts that their Confessions then should not prove, is very strange; and it were impossible and fruitless to expect that after they are imprisoned amongst a

company of other malefactors, and after they have a kind of men towards the Law to teach them the art of retractation, and that their conscience turns callus and acquainted with the idea of their own crime, a sincere Confession may be then expected from them.

My Lord Advocate declares he does not insist against the pannell for Conversing with Rebells at this time, and upon the shooting at a Bishop or Minister before the late act of parl. *anno* 1670, to inferr an arbitrary punishment, and insists upon Mutilation as capitall, upon the act of parl. anent demembration which is *reddere membrum inutile.* And a man is as much dismembred when he has an useless hand, as if he had no hand, and insists upon the 28 Act par. 3. Ja. 4, wherein slaughter and mutilation upon forethought fellony, are equiparant, and the pannell declared to be punished by death in both these cases, but refers the punishment of mutilation to be qualifyed by the Justices, according to what shall be found here proven, and to what has been the custom of the Justice Court formerly, in such cases.

Duplys Sir George Lockhart, that the lybell is no ways relevant as founded upon the 4 Act par. 16, Ja. 6. and the defence is no ways elided by the alledgiance contained in the Reply, for, 1° the Lords of Justitiary would be pleased to take nottice that there is no speciality in the case of this act of parl. as to privy Counsellours, but that it extends to all his Majesty's officers, and consequently the nearest[1] officer being invaded in the terms and under the qualification contained in the act of parl. might plead the benefit thereof. And if the lybell should be sustained in generall terms without the express qualification contained in the act of parl. the simple act of Invasion of a lyon herauld, tho neither death nor wound followed on it, would inferr the pain of death, but that no such thing is the meaning, nor can subsist with the act of parl. as it was impossible for the witt of man to express the qualification to be lybelled and positively proven in more plain and direct terms then is sett down in the saids Acts. In sua far as the Act of parl. requires by way of provision and condition in the statutory part thereof in thir terms, it being verified and proven that any of the saids Counsellors, sessioners and officers, was pursued and invaded for doing of his Highness service, shall be punished to the death, and there is great reason

[1] 'meanest' in Cobbett.

and necessity for this qualification, because the act of parl. intending contrary to the custom generall of nations and of this kingdom in all other crimes that *Conatus et attentatus*, which is only relevant in the crime of Treason, should be reputed *crimen consumatum* in case of invasion of any of his Majesty's officers. Therefore the law requires this qualification in matter of fact, that it be verifyed that the person invaded was doing his Majesty's service, in which case the crime had a respect in the construction of law as done against his Majesty's authority, which he was then executing, and this qualification in matter of fact, that it was for doing of his Majesty's service, is not here so much as lybelled. And in the opinion of all lawyers, as may appear by Julius Clarus § *Assasinium*, num 2, *ubi agitur de imponenda pœna alicujus constitutionis specialis, requiritur quod concurrent omnes qualificationes de quibus in ipsa constitutione*,[1] *expressas alias pœna non committatur, et haec*, says he, *est doctrina communitur ab omnibus recepta*, and most especially when it is not an extrinsick quality and aggravation, but where its a qualification required by law it self as *integrans delicti*, and as Gomes says, it is *alterativum pœne*, and therefore it must be *totidem verbis* lybelled and positively proven. And as to that pretence that its to be presumed and inferred from the circumstances and the way and manner of the committing of the fact it self, and that *propositum* and design cannot be otherways proven *nisi per indicias et conjecturas*, it is Duplyed that the qualification required by the act of parl. is *toto cœlo* different from the design, for if a person did invade any of his Majesty's officers in doing of his Majesty's service, and would pretend that he had no design to invade, certainly the pretence were absurd, and in that case the design *presumitur ex natura attentati*, but the discharging of his Majesty's service is not a design but a matter of fact, which consists in an extrinsick action and must be proven, and may and does often occurr, as for instance if a Magistrate should be invaded in the actuall execution of his Majesty's authoritie, or if the invader should be so transported with rage, as when he invades a Judge to tell him that it was because he has unjustly decerned, these and the like crimes are indeed the terms of the act of parl. and their simple invasion, tho no wounds followed, being directly lybelled against his

[1] The following sentence, which is given in Cobbett, has evidently been omitted, 'And Quest. 35 Num. 9 he has the same words, *Ubi agitur ad imponenda pœna alicujus specialis, constitutionis oportet quod in eo casu verificentur omnes qualitatis in ipsa constitutione.*'

Majesty's authority *nudus conatus et affectus delinquendi reputatur pro effectu.* And as this is clear from the express words of the act, and which being *in materia correctoria et criminale,* is strictly to be interprete, so it is unanswerably evidenced from the act of parl. King Cha. I. of blessed memory by which it is provided that the invasion and violence done to ministers is punishable conform to the act of parl. 1587, to which it relates, which is confiscation of moveables, and declares that the said act is to be extended to Archbishops and Bishops, from which the pannell's procurators argue thus, if by the posterior act of parl. *in anno* 1633 the invasion and violence done to Archbishops and Bishops is not punishable with the pain of death, but only an arbitrary punishment, how is it possible that the 4 act parl. 16 Ja. 6. should inferr the pain of death upon the invasion as it is circumstantiat and lybelled, wherein nothing is lybelled but that the Archbishop was invaded, who was a privy Counsellor, and not the qualification that is required by the act of parl. that it was for doing of his Majesty's service.

As to that alledgeance that the pannell cannot condescend upon any private ground of Quarrell or other reason why he did invade the Archbishop, its answered, if this alledgeance were sustained, it were contrary to the act of parl. lybelled upon, which does not require the pannells to prove, but says that it must be tried and verifyed that the invasion was for doing of his Majesty's service, and so his Majesty's advocate must prove the samen by as clear and positive probation as a point in matter of fact.

As to that pretence that the pannell did glory that he had committed the fact and invasion lybelled and endeavoured to justify the same and perswade others that it was lawfull, it is duplyed, that as the saids qualifications are altogether disowned, so they are no ways the qualifications in matter of fact required by the act of parl. viz. that the invasion and violence was for doing of his Majesty's service, which is indispensibly required upon the reasons above-mentioned, otherways the act of parl. should have said no more but that all invasions of his Majesty's privy Counsellors or other officers, should be punished with the pains of death, whereas the act of parl. thought it just, necessar and fitt for all men's security that a single act of invasion of any of his Majesty's officers, however it might be punished *pœna arbitraria,* yet should not import or inferr the pain of death.

In sua far as the Dittay is founded upon the Common Law, and that it is *assasinium* in which *conatus et attentatum habentur pro crimine consumato*, its answered, the Dittay is no ways relevant, because it is not founded upon any law or act of parl. of this kingdom, and the Common Roman Law cannot be the foundation of Criminal Dittays, whereby to draw in hazard the lives of any of his Majesty's subjects. Likeas there is clear, express and positive acts of parl. to the contrary, as the 48 act, par. 3, Ja. 1, act 79, par. 9, Ja. 4, declaring that the laws of no other realm are to be regarded, specially whereupon to found Criminall Inditements. And albeit by the Common Law, *Conatus in homicidio*, especially where it was *homicidium dolosum*, and designed to be committed *proditorie et per insidias*, was punished as *crimen consumatum*, yet all lawyers do agree, as may appear by Julius Clarus, Quest. 10. Farin. Quest. 80. And by the Authoritys by them cited, that by the generall custom of all nations *in omni genere homicidii affectus conatus et attentatum*, is not punishable *pœna ordinaria delicti*, and so cannot inferr a capitall punishment or pain of death, as is concluded in this Inditement.

As to that pretence, that the crime lybelled is the crime of assasination, in which *nudus conatus* is sufficient, especially *si devenerit ad actum proximum*, it is answered 1° That the lawyers agree in this, that *crimen assasinij* is only where a person does hire or conduce another to committ the same *interveniento pretio*, and for which Julius Clarus § *assasinium*, where he so descrives the crime, and Matheus *de Criminibus*, does so descrive the same, and does expresly assert, that unless money or reward interveen, the crime of assasination cannot be committed, where the words are *crediderim tamen nisi merce certa et sceleri proposita et constituta fuerit sive in specie seu corpore sive in pecunia numerata non posse enim videri assasinium*. And there is no lawyer extant that did ever otherways descrive the crime, and there is great reason why money or reward should be considered in the constitution of this crime, because Law did consider the crime with respect to the hazard, and the hazard lay where persons were hired or conduced by infidels giving money or other reward to kill christians. And albeit even in the proper crime of assasination it self in some particular nations, where the said crime was too frequent, as in Italy, *conatus* is punishable, yet Julius Clarus in the same § and others, does maintain that by the generall custom of most nations, in the precise crime of assasination, *conatus seu attentatum* is not

punishable with the pain of death, but the pannell has no reason to insist upon this, the matter of fact lybelled being no ways the crime of assasination, but only that which Lawyers call a design to committ murder, *proditorie et per insidias.* In which all agree that by the custom of all nations *conatus faciendi non reputatur pro facto.*

As to the point of the Dittay founded upon the mutilation of the deceast Bishop of Orkney, conform to the 28 act par. 3 Ja. 4, its answered, that denying that the deceast Bishop of Orkney was mutilate, so albeit it could be proven, it cannot inferr the pain of death, first because its clear by the said act of parl. that it is not in the case of mutilation but demembration, and it were a strange imagination to think that if a party were mutilate, or lost a finger, that the pain of death should be inferred, and there is a great difference betwixt mutilation and demembration, mutilation being only an inability or privation of the use, whereas demembration is the entire loss of the member. And it is a principle in law, that acts of parl., especially *in casu criminali et capitali* cannot be extended *de casu in casum etiam ex identitate vel paritate rationis,* and that *Cortici verborum adherendum est, et casus omnissus habetur pro omissa.* And here there is no parity of reason, both the prejudice and deformity being far greater in demembration than mutilation.

And whereas its pretended that tho the pannell's Confession had even *elicite sub spe immunitatis,*[1] that yet it is not sufficient whereupon to liberate from capitall punishment, because a Judge cannot remitt a crime, and that Bossius and others are clear that notwithstanding of any such Confession upon promise of impunity, yet a Judge might and ought to condemn *ad pœnam ordinariam delicti,* its answered, the pretence does not elide the defence, because supposing it should be proven that the Confession was *elicite sub spe veniæ* and upon assurance of life, such a confession so elicite cannot be a ground whereupon to violate the faith and impunity given, and far less can such a Confession, tho any could be proven, being retracted, be considered as a Confession, and to which law and lawyers are very clear and positive. The law is lex 8. *cod. de custode reorum,* and lawyers, as may appear by Matheus *de criminibus,* quest. 16, where his express words are *Quærunt an confessio promissa impunitate et spe veniæ elicita sufficiet ad condemnandum respondendum non sufficere, tametsi enim in judicis potestate non sit promittere impunitatem adeoque*

[1] '*impunitatis*' in Cobbett.

ex promissione non obligatur tamen dolo extorta est, et per hanc fraudem etiam innocentes illaqueari possunt. And Bossius in that title *de Confessis*, after he had stated the case resolves it thus, *tutius tamen est ut dicamus requirere perseverantiam et est ex mente doctorum et cum ratione quin negari non potest quin talis confessio sit obumbrata*, and says it were against humanitie it self to condemn *ad pœnam ordinariam delicti* in such a case, and Julius Clarus, cited by his Majesty's advocate, says, *Ego non condemnarem ad mortem*, and which is indeed the constant and irrefragable opinion of all lawyers and practick of all Criminall tribunals. And whereas its pretended that Julius Clarus subjoins these words *nisi alijs indiciis sic gravatus*, and his Majesty's advocate condescends upon severall presumptions. Its answered, if his Majesty's advocate will lay aside the Confession and adduce such a presumptive probation whereupon the pannell may be condemned, then he may plead the benefit of that qualification, but the presumptions condescended upon are remote conjectures and no ways concluding, and the pannell after the alledged committing of the fact, did return and live peaceably for severall years, and denies the fact and cannot be otherways convict thereof, and if any pretended Confession should be made use of either *per se* or *in modum adminiculi*, it cannot be divided from the quality under which it was granted, which the pannell offered to prove was upon express assurance.

And whereas its pretended that the granting of an assurance and impunity is upon the matter a remission which no inferior Judge can grant, but that notwithstanding he may and ought to condemn, its answered, 1° It will appear by the probation of what character and quality the granter of the assurance was. 2° Lawyers do not consider whether a Judge *potest veniam concedere*, or remitt a crime, but a Confession being *elicite sub spe veniæ* is not a full and absolute Confession, but a qualified one, and cannot be made use of, and the quality not performed and made good. And it were a prejudice to publick interest, and a way to preclude the ingenuity of all confessors, if notwithstanding of the interposition of publick faith, and the granting of assurances, and the eliciting of Confessions *spe veniæ*, the Confession might be made use of, and the quality and condition upon which it was emitted, altogether neglected, which is downright inconsistent with the opinion of Lawyers, and the practises and customes of Criminall Judicatorys.

As to what is pretended, that tho this Confession be not emitted before the Lords of Justitiary, yet it was not extrajudiciall nor

revockable, because it was deliberately given and before a Committee who had authority from the Lords of his Majesty's privy council Its answered, this point is of extraordinary importance and consequence as to the laws and fortunes of his Majesty's subjects, and as to the Lords of Justitiary and the procedure of the inquest, who are Judges to the probation, and therefore its represented in behalf of the pannell, that admitting any pretended confession should be produced, yet if it was not emitted before the Lords of Justitiary, it was not a judiciall but an extrajudiciall confession *et fidem non facit* as to the probation of the crime, as to which, 1° There is an universall concord in the opinion of all Lawyers, and in the practice and customs of criminall judicatorys, and as to which the Lords of Justitiary are desired to cast their eye upon all who have written upon this point, and as Clarus says *non invenies dissentientem in mundo*, and it is strange that all Lawyers and the custom of all nations should have halucinate in this point, for which the pannell's procurators cite Julius Clarus quest. 5 ffarin. quest. 81, and many others. 2° Lawyers are likewise clear that Confessions emitted *coram judice competente*.[1] And when the question is who is to be repute *judex incompetens*, it is positively resolved that *omnis judex est incompetens* who could not proceed *ad condemnandum* as to the crime anent which the Confession is emitted, and certainly tho any Confession were produced emitted before a Committee of the Lords of privy Council, they have no criminal jurisdiction so as to proceed *ad condemnandum in crimine capitali*, that being clear by Craig, Dieg. 8 that *ex eorum statutis nec periculum vitæ hereditatis aut omnium fortunarum subire posse*. And whereas its urged that the Lords of privy Council have annexed jurisdiction[2] and may proceed by way of precognition *et per modum inquisitionis*, and may resolve doubtfull cases and qualifie sentences, its answered, it is not denyed that the Lords of privy Council have and do very well deserve that jurisdiction, but as to criminal jurisdiction in capitall crimes, it is only competent to the Lords of Justitiary and the precognitions or previous inquisitions tend not *ad condemnationem*, but only as to this whether to stopp or remitt to the Lords of Justitiary, and nothing is considered as a Judiciall Confession, but where there is *formatus processus* and where a party

[1] There has been an omission here of the following: '*sed non sedenti pro tribunali* is but ane extrajudicial confession and much more where it is *confessio emissa coram judice incompetente*.'

[2] *Sic*, but 'a mixed jurisdiction' in Cobbett.

is called *coram judice competente* and is *sub instante periculo vitæ*, and knows that the infallible import of his Confession is to that very effect for his condemnation, none of which can be pretended where the Confession is emitted *coram judice incompetente ad condemnandum.*

And whereas its alledged that a Confession in the opinion of Lawyers cannot be retracted unless the party could *docere de errore* and purge his innocency, and did it *ex incontinenti*, its answered the alledgeance is groundless, for tho a Confession were emitted *coram judice competente pro tribunali*, it might be retracted *ex incontinenti* if he were able *docere de errore*, and there is no lawyer ever required it in other terms, but when the Confession is emitted *coram judice incompetente fidem non facit quoad probationem delicti*,[1] and may be retracted either *ex incontinenti* or *ex intervallo*, and without showing of any error or purging of innocence, such confessions in law amount not to any probation no more then as lawyers argue if the Depositions of witnesses taken *in uno judicio* would *fidem facere* either *in casu civili aut criminali malio*[2] *judicio.* And certainly there is less reasons for Confessions where parties disown the same, and retracts them if emitted, and much more here where the pretended Confession was *elicite sub spe veniæ*, so far was the pannell from thinking that the emitting of his Confession was in order to condemnation, specially seeing it neither is nor can be proven that the said pretended confession was so much as judicially given in face of privy Council, where his Grace the Duke of Lauderdale, being then his Majesty's Commissioner, was present. And tho it were, the pannell's procurators will not debate the import of his Grace's Commission, but remitts the same to the Commission it self, in case it be offered to be proven that the Confession was emitted before him and the Lords of privy Council.

And whereas its alledged that the . . . act 90. parl. 11. K. J. 6, ordaining the probation to be led in presence of the Assise, does not concern the case, and is misunderstood, seeing here the Confession will be produced in presence of the assise, its answered, the act of parl. is clear to the contrary, and can admit of no such interpretation.[3] For albeit the narrative of the act. of parl. bear that abuses never committed *et ex malis moribus bonæ oriuntur leges*,

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[1] '*indicti*' in Cobbett.

[2] '*in alio*' in Cobbett.

[3] 'can admit of such interpretation' in Cobbett.

the narrative of the act of parl. was only *causa impulsiva* and the statutory part of the act of parl. is clear and positive, that all probation should be adduced in presence of the Assise who are Judges of the probation. And of all other probation there is the greatest reason that the very act of Confession should be in presence of the assise, who are Judges to the probation, and who are to proceed upon oath, and whose consciences are to be satisfyed and instructed as to the way, manner, conditions, and terms whereupon such confessions were elicite. All which are concealed where there is nothing produced to them, but a Confession taken without their presence especially seeing the pannell alledges and offers to prove that several points of fact and other particulars were condescended upon and declared, none of which are mentioned in this pretended Confession. All which should have been insert, and could not be divided as being *in articulo connexo*.

And whereas its pretended that Decreets pronounced before the Lords of Session is *probatio probata*, whereupon assisers may and ought to condemn, its answered, the argument is *in materia disparata*, and does not concern the matter of confession, and is only in the speciall case of falshood, and that upon a speciall reason, because the investigation of falshood depended upon a Triall and concourse of many and violent presumptions, which may require a long tract of time and examination of parties and witnesses. It were impossible that such Trialls could be adduced before an Inquest, these depending severall years many times before the Session, before they can be brought to a close. And therefore Law and Custom in that case has sustained a Decreet of the Lords of Session as a probation *in judicio criminali*, but it is absolutely denied that it would hold in any other crime, and certainly if the crime of Theft were pursued civilly before the Lords of Session *ad damnum et interesse*, tho the Theft should be proven or confest before the Lords of Session, it would not *fidem facere in judicio criminali*,[1] as is evident by the authority of lawyers, who agree that *acta probatoria in uno processu fidem non faciunt*[2] *in alio*. Nay, which is more, *acta probatoria in uno processu fidem non faciunt in alio processu coram eodem judice*. And as to the instance of the practick of M^cNabb, the pannell oppones the same, wherein there were depositions of witnesses. And tho many times in the

[1] '*criminale*' in Cobbett.

[2] '*non facit*' in Cobbett.

adjournall books the cases of confessions emitted has been intruded,[1] yet it cannot be instanced that ever the Lords of Justitiary did by interloquitor sustain the same as probation, but on the contrary it does appear in the case of Fraser in the year 1641, that Sir Thomas Hope, being then his Majesty's advocate, declared that a Confession emitted before a sherriff depute, who has a criminall jurisdiction in some cases in the terms allowed by law, and who beyond all doubt is judge competent *per modum inquisitionis*, yet so convinced was he that it was an extrajudicial confession that he only insisted therein *in modum adminiculi*, and joyned it with the other probation mentioned in that practicque, which was *per se* convincing and sufficient. As also since his Majestys happy Restoration, in the case of one Robertson, altho the Confession was emitted before one of the Lords of Justitiary and his Majesty's advocate for the time, yet he was so convinced of the insufficiency of the same, that after it was produced *per modum probationis*, he took up the samen even in that state of the proces when the assise was sworn. And as to the Divinity in David's practice, it does not concern the point of law, and cannot be made appear that the party retracted his Confession, and it is a practick that either *Nimium* or *nihil probat.* In respect whereof, etc.

The Lords Commissioners of Justitiary continue the advising of this Debate till the 9th instant, and ordains assisers and witnesses to attend ilk person under the pain of one hundered merks Scots.

Edinbr. 9 day forsaid, the Interloquitor following was pronounced. The Lords Commissioners of Justitiary having considered the Dittay and Debate relating thereto, ffind that Article of the Dittay founded upon the 4 Act, 16 parl. Ja. 6, bearing the pannell's invading by shooting and firing a pistoll at his Grace the Archbishop of St. Andrews, a privy Counsellor, for doing his Majesty's service, relevantly lybelled, his Majesty's advocate proving the presumption in his Reply, viz. That the said pannell said he did make the said attempt and invasion because of the Archbishop his persecuting these that were in the Rebellion at Pentland, or some words to that purpose, relevant to inferr the pain contained in the forsaid act. of parl. and remitts the same to the knowledge of an assise. Interloqr.

[1] 'obtruded' in Cobbett.

And likeways ffinds that part of the Dittay anent the invading of Bishops and Ministers, relevant to inferr an arbitrary punishment, and remitts the same to the knowledge of an assise. And sicklike, that Article of the Dittay anent the wounding, invading, and mutilating of the Bishop of Orkney, relevant to inferr an arbitrary punishment, and remitts the same to the knowledge of an assyse. And also having considered that part of the Debate anent the pannell's Confession, made and emitted before a Committee appointed by authority of Council to receive it, and thereafter adhered to and renewed in presence of his Majesty's High Commissioner and Lords of Privy Council, conveened in Councill, ffinds it is judiciall and cannot be retracted. And also having, considered the Debate and Defence against the said Confession, viz. That the same was emitted upon promise or assurance of impunity of life and limb, ffinds the samen relevant to secure the pannell as to life and limb, reserving to the Commissioners of Justitiary to inflict such arbitrary punishment as they shall think fitt, in case the Defence shall be proven, and remitts the samen to the knowledge of an Assise.

ASSISA

Gordon of Cairnburrow.
David Burnett, merchant in Edinbr.
James Wood, at the Colledge Port.
David Forsyth, taylour.
Robert Campbell, apothecary.
Captain Andrew Dick.
David Bruce, gentleman.
John Hay of Barro, Chancellour.
Thomas Comly, vintner.
Mr. Alex. Auchmoutie, ensign.
Captain John Binning, vintner.
Alexr. Livingston, ensign.
William Stevenson, younger, merchant.
Charles Scott of Bonintoun.
Peter Wishart, lieutenant.

The Assise lawfully sworn, no objection in the contrair. His Majesty's advocate for probation adduced the pannell's own Confession, with the witnesses, after deponing of the whilk Confession the tenor follows.

Edinb. 10 Febry. 1674. In presence of the Lord Chancellour, Lord Register, Lord Advocate, and Treasurer Depute, Mr. James Mitchell, prisoner, being called, did freely confess he was the

person who shott the Archbishop of St. Andrews, when the Bishop was hurt thereby in the year 1668, and depones upon oath, that no living creature did perswade him to it, or was upon the knowledge of it. *Sic subr.* J. Mitchell. Rothes. A. Primrose. Jo. Nisbet. Ch. Maitland.

Mr. Charles Paterson, advocate, purged of partiall Council and solemnly sworn, Depones he mett a man with a pistol in his hand in Blackfryar's wynd, immediatly after the pistoll was shott at the Archbishop, but knows not the pannell, nor if he was the person that shott, and this is the truth as he shall answer to God. Will. Paterson. A. Primrose.

Patrick Vanse, Keeper of the Tolbooth of Edinbr., purged of partiall Councill and solemnly sworn, Depones, that a day or two before or after the pannell was examined by the Council, he confest to the Deponent that he shott a pistoll at the Archbishop of St. Andrews, and escaped down Blackfriars Wynd, and went up the Cowgate, and in to Mr. ffergusons house, and putt on a periwig, and then came to the street and searched for the man that shott the pistoll. Being demanded if he heard Mr. James Mitchell justify the deed, he depones he remembers it not. *Sic subr.* P. Vanse. A. Primrose. *I.p.d.*

Mr. John Vanse, son to the Keeper of the Tolbooth, purged and sworn, being interrogate if he heard the pannell acknowledge the deed of shooting at the Bishop, or defend it, depones that being in conference with the pannell in the prison house, he enquired at him how he or any man could be accessary to so impious an act as to kill a man in cold blood, who had not wronged him, he said it was not in cold blood, for the blood of the Saints was reeking at the Cross of Edinbr. *Sic subr.* John Vanse. A. Primrose. *I.p.d.*

John Bishop of Galloway, being purged of partiall council, sworn and examined, Deponed, that the first time he saw the pannell, was in Sir William Sharp's outter room, where he saw a pistoll, which was said to be taken from him, out of which (as he supposes) there were three balls taken, and that the pistoll was like the pistoll produced. Depones that at that time the pannell did not confess any guilt, but seemed to be in a great consternation, and fell a trembling, and that the deponer hearing that he had made a Confession, went to prison to speak to him about it, who acknowledged to the Deponent that he had made confession of that attempt against the Archbishop before the Chancellour

and some others of the council, and that he had hopes of life, and desired the Deponent to interceed for him. And the Deponer having asked him how he could do such a deed against an innocent man, he answered, that he thought him an enemy to the Godly, and that they could not be in security so long as he was alive. And the Deponent having inquired him if he was sorry for it, he did not say he was sorry for it, but if it were to be done again he would not do it. And this is truth as he shall answer to God. *Sic subr.* John Galovidien. A. Primrose. *I.p.d.*

Doctor Christopher Irving, purged of partiall Council, solemnly sworn, depones that he was the first chirurgeon that came to the Bishop of Orkney after he received the shott, and that he did see a ball fall out of his sleeve, so that he knew that it was with a shott, and that the bones were fractured, and that they cured him so as he was able to lift his hand towards his head, but there was still scales coming out of the orifice of the wound. Depones the Bishop said he gott the wound when he was laying his hand upon the Archbishop's coach. *Sic subr.* C. Irving. A. Primrose. *I.p.d.*

John Jossie, chirurgeon, purged, sworn, and examined, depones that he was called to the Bishop of Orkney's cure, and that he had a wound betwixt the wrest and the elbow, which did cast out severall small bones at the two small orifices, and that the Bishop was able to lift his hand towards his head. *Sic subr.* Jo. Jossie. A. Primrose. *I.p.d.*

William Borthwick, chirurgeon, purged of partiall council, solemnly sworn and examined, Depones, conformis to John Jossie in all things. *sic subr.* Will Borthwick.

John Earl of Rothes, Lord High Chancellour of Scotland, being sworn and the Confession under Mr. James Mitchell's hand being shown to him, Depones that he was present and saw the said Mr. James Mitchell subscrive that paper, and depones that he heard him make the Confession contained therein, and that he thereafter heard him ratify the same at the Council barr in presence of the King's Commissioners and Lords of privy Council sitting in Council, and that his Lordship subscribed the said Confession. Depones that his Lordship, the Advocate, and Treasurer Depute were appointed by the privy Council to examine the said Mr. James and being interrogate if after they had removed the pannell to the Council Chamber, whether or not his Lordship did offer to the pannell upon his Confession to secure his life in these words, upon his Lordship's life, honour and reputation, Depones that he

did not at all give any assurance to the pannell for his life, and that the pannell never sought any such assurance from him, and his Lordship does not remember that there was any warrand given by the Council to his Lordship for that effect, and if there be any expressions in any paper which may seem to inferr any thing to the contrary, his Lordship conceives it has been insert upon some mistake. *sic subr.* Rothes. A. Primrose. *I.p.d.*

Charles Maitland of Hattoun, Lord Theasurer Depute, being sworn, and the Confession under Mr. James Mitchell's hand being shown unto his Lordship, depones he was present when Mr. James Mitchell made that Confession, and his Lordship first heard him make it verbally, and then he saw him subscrive it, and that his Lordship subscrived it also, and at that time there was nothing spoken of any assurance, but when the pannell was asked by some of the Committee upon what accompt he committed that fact, he seemed at first unwilling to answer, but thereafter said it was because the Archbishop is an Enemy to the good people or Godly people, in the west. Depones that within few days thereafter at a meeting of the Council, where the Duke of Lauderdale, then his Majesty's Commissioner, was present, the pannell being brought to the barr and the Confession produced being shown to him, he acknowledged the same to be his hand write, adhered unto and renewed the same in presence of his Majesty's Commissioner and Council, and depones that he did not hear the pannell either seek assurance of his life or any person offer the same to him. *Sic subr.* Ch. Maitland. A. Primrose. *I.p.d.*

John Duke of Lauderdale being sworn, depones that his grace was present as the King's Commissioner in Council where Mr. James Mitchell was brought to the barr. Depones his Grace saw the pannell's former Confession made at the Committee of the Council shown to him and he acknowledged it to be his Confession, and that he did adhere thereto and renew the samen in presence of his Grace and the Council. His Grace heard no assurance given to him, and that his Grace did not give him any assurance, nor gave commission to any others to give him any assurance, and could not do it, having no particular warrand from his Majesty for that effect. *Sic subr.* Lauderdale. A. Primrose. *I.p.d.*

James, Archbishop of St. Andrews, being sworn, depones, that that day the pannell did fire a pistoll at his Grace, he had a view of him passing from the coach and crossing the street, which had such impression upon his Grace, that upon the first sight he saw

of him after he was taken, he knew him to be the person that shott the shott. Depones that his Grace saw him at the Councill barr, in presence of his Majesty's Commissioner and the Council, acknowledge his Confession made before the Committee, and heard him adhere thereto and renew the samen, and that there was no assurance of life given him nor any sought by him. Depones that his Grace himself did never give him any assurance, nor gave warrand to any others to do it, only he promised at his first taking, that if he would freely confess the fault and express his repentance for the same at that time without farder troubling Judicatorys therein, his Grace would use his best endeavours for favour to him, or else leave him to Justice, but that he neither gave him assurance nor gave warrand to any to give it. Its a false and malicious calumny, and that his Grace made no promise to Nicol Somerveill other then that it was best to make a free Confession, and this is the truth as he shall answer to God. *Sic subr.* St. Andrews. A. Primrose *I.p.d.*

The pannel, Mr. James Mitchell after swearing of the Assise, produced a copy of a pretended act of Council, and craved that the Register of Council containing the said act might be produced, and after the examination and depositions of the witnesses upon the Dittay and exculpation, the pannell and his procurators farder urged that the Register of Council might be produced, seeing the pannel produced an Instrument against Mr. Thomas Hay, one of the clerks of Council, for giving an extract thereof, and the pannell and his procurators alledged that the Register of Council containing the said act, was produced in Court the day before, and that the said act was read by severall members of the Court, and being once produced and an Instrument taken against one of the Clerks of Council, who with the other clerk, were cited as witnesses by his Majesty's advocate. The clerks ought to be ordained either to give an extract or produce the Register containing the forsaid Act, and the pannell and his procurators desires to be heard in write upon the said act of Council.

His Majesty's Advocate answers, that he was not obliged to produce a Register for the pannell, and if any such pretended act was, he should have used a Dilligence and cited the Clerks of Council for producing of the Register, or giving an extract, which the pannell not having done, he cannot be allowed a Dilligence in this state of the proces. And if any such act of Council was, it was unwarrantable and could not be made use of after the Lord

Chancellour, Duke of Lauderdale, and the Lord Theasurer Depute, and other Lords of Council had deponed that there was no such assurance given, as is either pretended by the exculpation, or insinuated by the pretended act of Council. And by the copy produced it is evident that the design thereof is to take from the pannell any pretended favour he pleads, and if the act be founded on it cannot be divided, so that a meer narrative must prove, and the statutory words should not prove, especially seeing there is nothing more nottar and ordinary then for the Council not to consider a narrative, if the statutory words be right, and as the pannell pretends that his Confession cannot be divided from the assurance given, but that it must be taken with the quality, so much less must this Act be divided, and the pretended act is long posterior to the pannell's Confession and even posterior to a former Diet in the Justice Court appointed for the pannell's triall for the said crime. And farder no such assurance could have been granted, seeing none but his Majesty can grant remissions.

The pannell and his procurators desired the copy produced to be read.

His Majesty's advocate consents to the reading of the pretended copy of the act of Council, and which being publickly read is of the tenor following.

Edinbr. 12 March 1674. The Lord Commissioner, his Grace, and the Lords of his Majesty's privy Council, having appointed a Committee of Council to examine Mr. James Mitchell, prisoner in the Tolbooth of Edinbr., the said Mr. James being brought before the said Committee, did make a free and voluntary Confession of his accession to the rebellion and rising in arms in the west, and that after he had nottice of the same, he went from Edinbr. with Collonel Wallace and others, and joyned with the Rebells there, and from thence came along and was with them untill the night before the fight at Pentland hills, and that at the desire of Captain Arnott he came then to Edinbr. to speak to some persons there concerning them, and being examined upon the attempt made upon the person of the Archbishop of St. Andrews, and who shott the pistoll at the said Archbishop when the Bishop of Orkney was hurt in the month of July 1668, he did declare, that at that time and the day the said attempt was made, he was in the town of Edinbr., and that he had bought the pistoll which was about him, charged with three balls, when he was apprehended, about that time when the Bishop was

shott, from Alexander Logan, dage maker in Leithwynd, but refused that he was the person that made the said attempt untill having retired a pace with one of the said Committee, he did confess upon his knees that he was the person, upon assurance given him by one of the Committee, as to his life, who had warrand from the Lord Commissioner and the Council to grant the same, and did thereafter confess freely before all the Lords that was upon the said Committee, that he shott the forsaid pistoll at the said Archbishop, and did subscrive his Confession in presence of the said Committee, which is also subscrived by them, and thereafter the said Mr. James did renew and adhere to the said Confession, both as to the accession to the rebellion and attempt forsaid, and acknowledged he made the said attempt because he thought that the said Archbishop had a hand in troubling and persecuting these that were in the Rebellion. And nevertheless being brought before the Lords Commissioners of Justitiary and asked if he did own the Confession forsaid, he did altogether refuse to answer and adhere to his saids Confessions, notwithstanding he was told by the Lords Commissioners of Justitiary and his Majesty's advocate, that if he would adhere to his saids Confessions, he should have the benefit of the said assurance, and if otherways, that he should lose the same. Therefore the Lord Commissioner, his Grace, and Lords of his Majesty's privy Council, do Declare that they are free and that the said Mr. James ought not to have the benefit of any such promises or assurance, and that the same is altogether void, and that the Lords of the Justitiary and the Assise ought to proceed without any respect to the same. And farder do Declare that the said Mr. James Mitchell is the person intended and meaned in the Proclamation in the years 1666 and 1667, discharging any intercommuning with the Rebells therein mentioned, and excepting the said Mr. James and the other persons therein from his Majesty's favour and indemnity, and no other under the name of Mr. James Mitchell, tho there had been any other of that name involved in the said Rebellion.

The pannell and his procurators renew the desire and crave to be heard to Debate upon the act of Council in writt.

The Lords Commissioners of Justitiary, considering that the copy of the pretended act of Council produced, was never urged nor made use of, nor any Dilligence craved for producing the Registers of Council, untill this afternoon that the assise was sworn, after which no Dilligence can be allowed or granted in

this state of the proces by the law of the kingdom and practick of this Court, especially seeing it appears by the said copy that the design was to take away any assurance that the pannell could have pleaded, and that the truth of the Narrative of the copy founded upon, insinuating that there was an assurance, is cancelled by the Depositions of the Duke of Lauderdale, then his Majesty's Commissioner, the Lord Chancellor, and other members of the Committee and Council. The saids Lords therefore, ordain the Assise to inclose and return their verdict to morrow at two a clock in the afternoon.

Verdict of the Assise.

Edinbr. the said 10 January 1678. The Assise gives in their Verdict conform to the above written Deliverance, whereof the tenor follows. As to the first part of the lybell, founded upon the 4 Act 16 par. Ja. 6. the chancellour and whole Assise with one voice ffind it proven conform to the Lords' Interloquitor, as to the Invading of Bishops and Ministers and wounding the Bishop of Orkney, sicklike proven with one voice. As to the third part of the Lords' Interloqr. concerning his Confession first before a Committee, and thereafter before his Majesty's High Commissioner and Council, the whole Assise with one voice find it proven conform to the Lords Interloqr. As to the fourth and last part of the Interloqr. concerning the exculpation, the whole Assise with one voice ffind it no ways proven, and furder concerning the exculpation, when the pannell was pressing it strongly upon my Lord Chancellour, the whole Assise heard his Confession and acknowledgement of the fact. *Sic subr.* Jo. Hay, Chancellour.

Sentence against Mr. Ja. Mitchell.

After opening and reading of whilk Verdict, the Lords Commissioners of Justitiary by the mouth of Adam Auld, dempster of Court, decerned and adjudged the said Mr. James Mitchell to be taken to the Grass mercat of Edinbr. upon ffriday the 18th day of January instant, betwixt two and four a clock in the afternoon, and there to be hanged on a Gibbet till he be dead, and all his moveable goods and gear to be escheat and inbrought to his Majesty's use, which was pronounced for Doom.

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